

NORTH CAROLINA  
COURT OF APPEALS  
REPORTS

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2012

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**201 N.C. APP.**



This volume of the North Carolina Court of Appeals Reports is dedicated to Chief Judge John C. Martin by the members of the Court for his leadership and service as Chief Judge of the North Carolina Court of Appeals from January 2004 to the present.



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Kimberly Woodell Sieredzki  
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12	CLAIRE HILL	Fayetteville
12B	GREGORY A. WEEKS	Fayetteville
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13A	DOUGLAS B. SASSER	Hallsboro
13B	OLA M. LEWIS	Southport
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17B	A. MOSES MASSEY ANDY CROMER	Mt. Airy King
18	LINDSAY R. DAVIS, JR. JOHN O. CRAIG III R. STUART ALBRIGHT PATRICE A. HINNANT JOSEPH E. TURNER	Greensboro High Point Greensboro Greensboro Greensboro
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	YVONNE MIMS EVANS	Charlotte
	LINWOOD O. FOUST	Charlotte
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	H. WILLIAM CONSTANGY	Charlotte
	HUGH LEWIS	Charlotte
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	ROBERT T. SUMNER	Gastonia
27B	FORREST DONALD BRIDGES	Shelby
	JAMES W. MORGAN	Shelby

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	MARVIN POPE	Asheville
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29B	MARK E. POWELL	Hendersonville
30A	JAMES U. DOWNS	Franklin
30B	BRADLEY B. LETTS	Sylva

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	RUSSELL J. LANIER, JR. <sup>9</sup>	Wallace
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	KENNETH C. TITUS	Durham
	JACK A. THOMPSON	Fayetteville
	JOHN M. TYSON	Fayetteville
	GEORGE L. WAINWRIGHT	Morehead City
	DENNIS WINNER	Asheville

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THOMAS W. SEAY	Spencer
RALPH A. WALKER, JR.	Raleigh

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1. Retired 1 April 2012.  
 2. Appointed 1 June 2012.  
 3. Retired 31 December 2011.  
 4. Appointed 12 April 2012.  
 5. Deceased 8 February 2012.  
 6. Appointed Senior Resident Superior Court Judge 13 February 2012.  
 7. Appointed 15 June 2012.  
 8. Resigned 31 January 2012.  
 9. Appointed 5 April 2012.  
 10. Resigned 4 February 2012.

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	MARTIN B. MCGEE	Concord
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	APRIL C. WOOD	Lexington
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	J. RODWELL PENRY	Lexington
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	MONICA HAYES LESLIE	Waynesville
	RICHARD K. WALKER	Hayesville
	DONNA FORGA	Clyde
	ROY WLJEWICKRAMA	Waynesville
	KRISTINA L. EARWOOD	Waynesville

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DENNIS J. REDWING	Gastonia
ANNE B. SALISBURY	Cary
J. LARRY SENTER	Raleigh
JOSEPH E. SETZER, JR.	Franklinton
RUSSELL SHERRILL III	Raleigh
CATHERINE C. STEVENS	Chapel Hill

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HARLEY B. GASTON, JR. <sup>19</sup>	Belmont
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ROLAND H. HAYES	Gastonia
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LILLIAN B. JORDAN	Randleman
JAMES E. MARTIN	Greenville
EDWARD H. MCCORMICK	Lillington
J. BRUCE MORTON	Greensboro
OTIS M. OLIVER	Dobson
STANLEY PEELE	Chapel Hill
MARGARET L. SHARPE	Greensboro
SAMUEL M. TATE	Morganton
JOHN L. WHITLEY	Wilson

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1. Retired 31 January 2012.
  2. Appointed Chief District Court Judge 8 February 2012.
  3. Appointed 11 April 2012.
  4. Appointed 31 August 2011.
  5. Resigned 18 May 2012.
  6. Retired 28 February 2012.
  7. Appointed 12 June 2012.
  8. Appointed 11 June 2012.
  9. Resigned 31 October 2011.
  10. Appointed 3 February 2012.
  11. Appointed 22 August 2011.
  12. Resigned 1 August 2011.
  13. Appointed 31 October 2011.
  14. Resigned 22 May 2012.
  15. Resigned 9 January 2012.
  16. Appointed 4 May 2012.
  17. Resigned 12 April 2012.
  18. Deceased 6 October 2011.
  19. Deceased 31 December 2011.

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CASES

ARGUED AND DETERMINED IN THE

**COURT OF APPEALS**

**OF**

NORTH CAROLINA

AT

**RALEIGH**

---

NANCY HENSLEY, DIANE KENT, AND CLEAN WATER FOR NORTH CAROLINA, INC.,  
PETITIONERS-APPELLANTS v. NORTH CAROLINA DEPARTMENT OF ENVIRON-  
MENT AND NATURAL RESOURCES, DIVISION OF LAND RESOURCES,  
RESPONDENT-APPELLEE, AND MOUNTAIN AIR DEVELOPMENT CORPORATION,  
RESPONDENT-INTERVENOR

No. COA08-1307

(Filed 17 November 2009)

**1. Environmental Law— trout waters buffer zone—sedimen-  
tation—land—disturbing activities—development of golf  
course**

The trial court erred by concluding that Mountain Air’s land-disturbing activities in the construction of a country club in a trout waters buffer zone were “temporary” and “minimal” and thus authorized by N.C.G.S. § 113A-57(1). Mountain Air would continue to conduct activity in the trout waters buffer zone after completion of all construction.

**2. Environmental Law— land-disturbing activities—develop-  
ment of golf course—pollution control act**

The General Assembly intended N.C.G.S. § 113A-57(1) to be a land-disturbing activity regulation statute and environmental pollution control act aimed at controlling or preventing the flow of sediment into the fresh waters of North Carolina. The protection of trout populations and habitat must be a primary objective and concern in reaching any final resolution when granting a variance allowing temporary and minimal land-disturbing activities within a trout waters buffer zone.

## HENSLEY v. N.C. DEP'T OF ENV'T &amp; NATURAL RES.

[201 N.C. App. 1 (2009)]

Appeal by Petitioners from order entered 2 July 2008 by Judge Osmond Smith in Superior Court, Wake County. Heard in the Court of Appeals 6 May 2009.

*Southern Environmental Law Center, by J. Blanding Holman, IV, Julia F. Youngman, and Geoffrey R. Gisler, for Petitioners-Appellants.*

*Attorney General Roy Cooper, by Assistant Attorney General Edwin Lee Gavin II and Assistant Attorney General Sueanna P. Sumpter, for Respondent-Appellee.*

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McGEE, Judge.

Mountain Air Development Corporation (Mountain Air) owns Mountain Air Country Club in Yancey County. At the time the dispute in this case arose, Mountain Air Country Club included a lodge, an eighteen-hole golf course, residences, and a private airstrip. Mountain Air sought approval in 2003 to construct a nine-hole golf course along and over Banks Creek, certified trout waters (trout waters), as defined by 15A N.C.A.C. 2B.0304(a)(1). Mountain Air sought approval of a variance from the Sedimentation Control Commission (the Commission) of the Division of Land Resources, a division of the Department of Environment and Natural Resources ((DENR), and along with Mountain Air, (Respondents)). The variance was required to conduct land-disturbing activities during periods of construction within the mandatory buffer zone provided for in N.C. Gen. Stat. § 113A-57(1) of Article 4, Chapter 113A of the North Carolina General Statutes: the "Pollution Control and Environment Sedimentation Pollution Control Act of 1973" (the Act).

Trout waters, such as Banks Creek, are "[s]uitable for natural trout propagation and maintenance of stocked trout[.]" 15A N.C.A.C. 2B.0301(c), and constitute "freshwaters protected for natural trout propagation and survival of stocked trout." 15A N.C.A.C. 2B.0101(e)(1). Banks Creek is also "protected for secondary recreation, fishing, aquatic life including propagation and survival, and wildlife." 15A N.C.A.C. 2B.0101(c)(1).

The Commission granted Mountain Air's request for a variance from the buffer requirements mandated in N.C. Gen. Stat.

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§ 113A-57(1). Mountain Air then proceeded to remove trees and tree canopy along 2,763 feet of Banks Creek, and to clear all buffer vegetation along 160 feet of Banks Creek. Mountain Air also temporarily diverted the course of a section of Banks Creek through pipes eighteen inches in diameter in order to install 1,868 feet of underground pipes, some as small as 36 inches in diameter. Finally, Mountain Air redirected that section of Banks Creek into the underground pipe system, and began construction of a fairway over a section of the piped trout waters.

Clean Water for North Carolina, Inc. (Clean Water) is a public interest group that provides support to local community efforts on issues related to water-quality, and has members who live on or near Banks Creek, including Nancy Hensley and Diane Kent (together with Clean Water, "Petitioners").

Petitioners filed a petition for a contested case hearing in the Office of Administrative Hearings on 12 November 2003, challenging the variance granted by the Commission to Mountain Air. Petitioners allege that Mountain Air's actions violate relevant statutes, will have a negative impact on Banks Creek, and will "significantly adversely impact [their] ability to use and enjoy their property." Mountain Air moved to intervene, and its motion was granted on 7 January 2004.

Petitioners and Respondents filed cross-motions for summary judgment, which were heard on 4 August 2004. By order filed 12 January 2006, Administrative Law Judge James L. Conner, II (the ALJ), granted both Petitioners' and Respondents' motions in part and denied both in part, ruling that genuine issues of material fact existed with respect to certain issues included in the motions for summary judgment. Relevant to this appeal, the ALJ ruled that N.C. Gen. Stat. § 113-57(1) prohibited the actions undertaken by Mountain Air, stating after lengthy analysis:

[T]he straightforward interpretation of N.C. Gen. Stat. § 113-57(1) that I have set out above not only gives the terms of the statute their most natural and direct meaning, it also carries forward the intent of the statute. Development is prohibited in the buffer zones except in exceptional circumstances: truly temporary and minimal incursions that are approved by the Commission (such as travel across the buffer by heavy equipment for staging purposes, with appropriate protections to assure that the sedimentation is minimal); facilities located on, over, or under a water-course, which cannot logically have a buffer (such as docks and

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bridges); and land-disturbing activity in connection with the latter (such as roads leading to bridges).

Respondents filed a “Motion for Reconsideration of Order and for Certification to N.C. Sedimentation Control Commission” on 12 April 2006. Petitioners and Respondents joined in a consent order on 27 September 2006, which certified the matter to the Commission for a final agency decision. The Commission entered its final decision on 19 January 2007, in which it overruled the ALJ on the issue of whether Mountain Air’s actions within the buffer zone were temporary and minimal, and entered summary judgment in favor of Respondents on that issue. Petitioners appealed the final agency decision to the Superior Court of Wake County. The trial court affirmed the final agency decision by order filed 2 July 2008, entering “summary judgment . . . in favor of [Respondents] on all matters raised in the Petition for Judicial Review.” Petitioners appeal.

We note that the Additional Factual and Procedural Background provided by the dissent may show that Mountain Air obtained the appropriate certifications and permits from other agencies before commencing construction of the project. These additional facts may also show that Mountain Air made considerable efforts to minimize the potential for sedimentation runoff during the main construction phase of the project, and that the Commission subjected Mountain Air to stringent requirements in an effort to minimize sediment runoff. Further, whether or not waters certified as trout waters actually currently contain trout is beyond the scope of this appeal. We are confined to making a determination based upon the classification of the waters made by the State of North Carolina, and are without authority to question that determination in this appeal. Certifications and permits issued by other agencies are not relevant to our determination of whether the variance granted by the Commission was proper. Nor may stringent conditions placed upon an improperly granted variance transform it into a properly granted variance. We do not find the additional facts included in the dissent’s argument relevant to this appeal.

## I.

“Section 150B-51(c) dictates the standard of judicial review in cases in which the agency does not adopt the ALJ’s decision. N.C.G.S. § 150B-51(c).” *Cape Med. Transp., Inc. v. N.C. HHS*, 162 N.C. App. 14, 21, 590 S.E.2d 8, 13 (2004).

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As provided in section 150B-51(c), in its *de novo* review of an agency decision declining to adopt the ALJ's decision, the trial court "*shall make findings of fact and conclusions of law . . . and shall not be bound by the findings of fact . . . in the agency's final decision.*" N.C.G.S. § 150B-51(c) (emphasis added). The plain language of the section permits the trial court to review the official record and make its own findings of fact and conclusions of law, without giving deference to any prior agency or ALJ decision. "*De novo* review requires a court to consider the question anew, as if the agency has not addressed it." Presumably, [section 150B-51(c)] makes clear that unlike the *de novo* review of questions of law under the traditional standard of review, in which the court might in some cases give 'some deference' even to questions of law, such deference is not to be given to any aspect of any prior decision in the case."

The legislative intent behind section 150B-51(c) is to increase the judicial scope of review in cases in which an agency rejects the ALJ's decision. Before the enactment of section 150B-51(c), "the standard of review for findings of fact [in the final agency decision] was very deferential [to the agency]."

We acknowledge our Courts have previously held that an agency's findings of fact if not objected to constituted the whole record and were binding on appeal. However, these cases were decided before section 150B-51(c) came into effect and are thus not applicable here. Therefore, consistent with section 150B-51(c), the trial court is permitted to make its own findings of fact, even though neither party objected to those findings.

*Id.* at 21-22, 590 S.E.2d at 13-14 (internal citations omitted); *see also Rainey v. N.C. Dep't of Pub. Instruction*, 361 N.C. 679, 680, 652 S.E.2d 251, 252 (2007). When our Court reviews

a superior court order regarding an agency decision, "the appellate court examines the trial court's order for error of law. The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly."

*Mann Media, Inc. v. Randolph County Planning Bd.*, 356 N.C. 1, 14, 565 S.E.2d 9, 18 (2002) (citations omitted); *see also McHugh v. North Carolina Dep't of Envtl., Health & Natural Resources*, 126 N.C. App.

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469, 474, 485 S.E.2d 861, 864 (1997). “The standard of review on a summary judgment motion is whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law.” *Cornett v. Watauga Surgical Group, P.A.*, — N.C. App. —, —, 669 S.E.2d 805, 811 (2008).

The case before us involves interpretation of N.C. Gen. Stat. § 113A-57(1).

When construing statutes, [the appellate] Court first determines whether the statutory language is clear and unambiguous. If the statute is clear and unambiguous, we will apply the plain meaning of the words, with no need to resort to judicial construction. “However, when the language of a statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment.” [ ] “The best indicia of [legislative] intent are the language of the statute or ordinance, the spirit of the act and what the act seeks to accomplish.”

*Wiggs v. Edgecombe County*, 361 N.C. 318, 322, 643 S.E.2d 904, 907 (2007) (internal citations omitted); *see also Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 518, 597 S.E.2d 717, 722 (2004) (“If the language is ambiguous or unclear, the reviewing court must construe the statute in an attempt not to ‘defeat or impair the object of the statute . . . if that can reasonably be done without doing violence to the legislative language.’”) (citation omitted). We review *de novo* issues of statutory interpretation. *R.J. Reynolds Tobacco Co. v. N.C. Dep’t of Env’t & Natural Res.*, 148 N.C. App. 610, 616, 560 S.E.2d 163, 167 (2002); *see also In re Proposed Assessments of Additional Sales & Use Tax v. Jefferson-Pilot Ins. Co.*, 161 N.C. App. 558, 559, 589 S.E.2d 179, 180 (2003).

## II.

[1] Petitioners argue on appeal that the trial court erred in concluding that the land-disturbing activities in this case were “temporary” and “minimal” and thus authorized by N.C. Gen. Stat. § 113A-57(1). We agree.

N.C. Gen. Stat. § 113A-57, “Mandatory Standards for Land-Disturbing Activity,” states in relevant part:

No land-disturbing activity subject to this Article shall be undertaken except in accordance with the following mandatory requirements:

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(1) No land-disturbing activity during periods of construction or improvement to land shall be permitted in proximity to a lake or natural watercourse unless a buffer zone is provided along the margin of the watercourse of sufficient width to confine visible siltation within the twenty-five percent (25%) of the buffer zone nearest the land-disturbing activity. Waters that have been classified as trout waters by the Environmental Management Commission shall have an undisturbed buffer zone 25 feet wide or of sufficient width to confine visible siltation within the twenty-five percent (25%) of the buffer zone nearest the land-disturbing activity, whichever is greater. Provided, however, that the Sedimentation Control Commission may approve plans which include land-disturbing activity along trout waters when the duration of said disturbance would be temporary and the extent of said disturbance would be minimal. This subdivision shall not apply to a land-disturbing activity in connection with the construction of facilities to be located on, over, or under a lake or natural watercourse.

N.C. Gen. Stat. § 113A-57(1) (2007). Land-disturbing activity is defined in relevant part as: “any use of the land by any person in . . . commercial development . . . that results in a change in the natural cover or topography and that may cause or contribute to sedimentation.” N.C. Gen. Stat. § 113A-52(6) (2007).

We hold that the completed actions of Mountain Air: removing or reducing ground cover in buffer zones, replacing forested land with fairways, re-routing portions of Banks Creek, and re-diverting the creek through underground piping, constituted “land-disturbing activity.” These actions clearly changed the natural ground cover and topography, and undoubtedly had the potential to “cause or contribute to sedimentation.”<sup>1</sup> In its “Overview of Pipe Installation Strategy,” Mountain Air stated that it had “determined that by creating work teams the chance of sediment leaving the site will be *reduced*.” (Emphasis added). This is an admission that though they believed their strategy would *reduce* the chance of sediment leaving the site—which was in the trout waters buffer zone—the chance of sediment leaving the site of the land-disturbing activities was still a real possibility.

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1. Respondents agree with this determination, stating in their brief “the evidence in the record shows that there is only a *potential* to ‘cause or contribute to sedimentation’ during Mountain Air’s construction activities.” (Emphasis added). We do not find the distinction between the words “potential” and “may” that Respondents apparently find.

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The trial court found that “Mountain Air [would] only be conducting a ‘land-disturbing activity’ (i.e., an activity that ‘may cause or contribute to sedimentation’) while doing construction in the trout buffer.” The trial court also found “no evidence in the record that there [would] be the potential for or actual sedimentation after the work in the trout buffer [was] completed and stabilized.” However, these findings are not supported by competent evidence in the record.

The evidence in the record shows that Mountain Air will continue to conduct activity in the trout waters buffer zone after completion of all construction. Specifically, Mountain Air will have to periodically remove trees and tree canopy in order to maintain the functionality of the golf course, and maintenance and repair of culverts and piping will also be required. We hold, as a matter of law, that this ongoing activity “*may* cause or contribute to sedimentation” (emphasis added), and thus constitutes ongoing “land-disturbing activity.”

N.C. Gen. Stat. § 113A-57(1) clearly and unambiguously mandates two different standards for land-disturbing activity, depending on whether the fresh waters involved have been classified as “trout waters.” The statute is also clear on its face that the buffer zone required for classified trout waters is more stringent than that mandated for other fresh waters. Respondents admitted that “[m]ore stringent buffer requirements apply to watercourses classified as trout waters” in their “Motion for Reconsideration of Order and for Certification to N.C. Sedimentation Control Commission.” Respondents also admit in their brief that the trout waters provision of N.C. Gen. Stat. § 113A-57(1) is a more stringent regulation.

The requirement for fresh waters in general is a buffer zone “of sufficient width to confine visible siltation within the twenty-five percent (25%) of the buffer zone nearest the land-disturbing activity.” N.C. Gen. Stat. § 113A-57(1). However, the statute further mandates that classified trout waters “shall have an undisturbed buffer zone 25 feet wide or of sufficient width to confine visible siltation within the twenty-five percent (25%) of the buffer zone nearest the land-disturbing activity, whichever is greater.”

The dissent states that there “is no authority in the General Statutes, or in the regulations for” the proposition that buffer zones along trout streams “be maintained in a natural, pristine state in perpetuity.” The dissent seems troubled by the idea that the mandatory language of N.C. Gen. Stat. § 113A-57(1), requiring an undisturbed

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buffer zone, would leave this buffer zone in place “in perpetuity.” We would suggest the language of N.C. Gen. Stat. § 113A-57(1) cited directly above is a clear pronouncement *by the General Assembly* that, subject to certain limited exceptions, mandatory trout waters buffer zones shall remain “undisturbed” in perpetuity, or until such time as the General Assembly decides to enact legislation to the contrary. Were we to ignore the plain language of the statute, we would be intruding into the province of the General Assembly, which, as the dissent correctly points out, is counter to the authority of this Court. We find nothing unusual about this restriction being placed in a statute dealing with sedimentation control through the regulation of land-disturbing activities, as the General Assembly has determined that such activities, and the sediment they may produce, constitute one of the primary threats to trout waters, and fresh waters in general. N.C. Gen. Stat. § 113A-51 (2007).

The plain language of N.C. Gen. Stat. § 113A-57(1) requires an undisturbed twenty-five foot buffer zone, or, if twenty-five feet is insufficient, a larger undisturbed buffer zone, between classified trout waters and land-disturbing activity. This mandatory buffer zone may only be violated by “temporary and minimal” land-disturbing activity when specifically authorized by the Commission. The exclusionary clause reads: “Provided, however, that the Sedimentation Control Commission may approve plans which include land-disturbing activity along trout waters when the duration of said disturbance would be temporary and the extent of said disturbance would be minimal.” “Said disturbance” can only refer to “land-disturbing activity,” which is the only “disturbance” mentioned in the exclusionary clause, and indeed, in the whole of N.C. Gen. Stat. § 113A-57(1). N.C. Gen. Stat. § 113A-57(1) requires that, even with approval from the Commission, land-disturbing activity within the mandatory undisturbed buffer zone, whether it be twenty-five feet or larger, must be both temporary and minimal.

There is nothing in the plain language of N.C. Gen. Stat. § 113A-57(1) that contemplates disturbance in the mandatory buffer zone protecting classified trout waters beyond the “temporary and minimal” exception. Clearly, land-disturbing activity that permanently removes the mandatory undisturbed buffer zone for trout waters from portions of trout waters far exceeds the authority granted in N.C. Gen. Stat. § 113A-57(1) for temporary and minimal land-disturbing activities within the buffer zone.

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Mountain Air conducted land-disturbing activity as defined by N.C. Gen. Stat. § 113A-52(6) within the mandatory buffer zone on 4,791 feet of Banks Creek. Mountain Air completely removed 160 feet of the mandatory undisturbed buffer zone of Banks Creek by clearing all vegetation. Mountain Air further removed trees and tree canopy within the buffer zone along 2,763 feet of Banks Creek. Mountain Air also re-routed a portion of the trout waters and installed 1,868 feet of underground piping, finally re-directing the stream through the permanent piping. This land-disturbing activity cannot be deemed “minimal” by any reasonable definition of that word. 15A N.C.A.C. 4B.0125(c) provides specific guidance on what may be considered “minimal” disturbance within a trout water buffer zone:

Where a temporary and minimal disturbance is permitted as an exception by G.S. 113A-57(1), land-disturbing activities in the buffer zone adjacent to designated trout waters shall be limited to a maximum of ten percent of the total length of the buffer zone within the tract to be distributed such that there is not more than 100 linear feet of disturbance in each 1000 linear feet of buffer zone. Larger areas may be disturbed with the written approval of the Director [of the Division of Land Resources of the Department of Environment, Health, and Natural Resources. 15A N.C.A.C. 4A.0105(26)].

15A N.C.A.C. 4B.0125(c). By Mountain Air’s own calculations, the total trout water length within the tract disturbed is 21,526 linear feet. Mountain Air has conducted land-disturbing activities—removal of all natural ground cover from the buffer zone, tree and tree canopy removal in buffer zone, and re-routing Banks Creek to enable pipe placement—that affect 4,791 linear feet of the trout waters on the property. That constitutes land-disturbing activity on over twenty-two percent of the trout waters buffer zone within the tract to be disturbed. There is nothing in the record to show that Mountain Air received written approval of the Director to exceed the limits mandated by 15A N.C.A.C. 4B.0125(c).<sup>2</sup>

We cannot agree with the dissent’s argument that, because respondent issued a variance pursuant to 15A N.C.A.C. 4B.0125(c), this variance automatically constituted “written approval of the Di-

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2. Because this issue is not before us, we make no determination here as to whether the Commission has the authority to override the “temporary and minimal” mandate of N.C. Gen. Stat. § 113A-57(1) by granting the Director the authority to approve land-disturbing activities within the buffer zone that are not temporary or minimal through the enactment of an administrative regulation.

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rector.” 15A N.C.A.C. 4B.0125(c) unambiguously requires “written approval” for any variance exceeding the “temporary and minimal” standard set forth in N.C. Gen. Stat. § 113A-57(1). There is nothing in the language of 15A N.C.A.C. 4B.0125(c) to suggest approval may be implied. Contrary to the assertion of the dissent, the variance issued by Respondent does not indicate that Mountain Air made any request to exceed the ten percent maximum, nor that Respondent ever considered the fact that Mountain Air would be exceeding that maximum. Respondent did not address any exception to the ten percent maximum in the variance it granted, and therefore did not give Mountain Air written permission in that variance to exceed the ten percent maximum mandated by 15A N.C.A.C. 4B.0125(c). Mountain Air needed to request approval from the Director, and the Director was required to grant specific approval, in writing. Therefore, pursuant to N.C. Gen. Stat. § 113A-57(1) and 15A N.C.A.C. 4A.0105(26), the land-disturbing activities conducted by Mountain Air during construction of the project were not “minimal,” and no variance should have been granted by the Commission.

Furthermore, the evidence shows that this land-disturbing activity was meant to be permanent, or to continue for at least as long as the projected nine-hole golf course remained in use. Respondents do not argue that the changes they have made, or will make, to the mandatory undisturbed buffer zone are in any manner “temporary.” Respondents base their argument on their contention that the “minimal and temporary” language in N.C. Gen. Stat. § 113A-57(1) refers to the effects of sedimentation runoff, not land-disturbing activity within the buffer zone. We have already rejected this argument based upon the plain meaning of the statute.

Further, there is no authority in the statutes or the administrative code authorizing relocation of a trout water in this case. 15A N.C.A.C. 4B.0112 states:

Land disturbing activity *in connection with construction in, on, over, or under a lake or natural watercourse* shall minimize the extent and duration of disruption of the stream channel. Where relocation of a stream forms an essential part of the proposed activity, the relocation shall minimize unnecessary changes in the stream flow characteristics.

15A N.C.A.C. 4B.0112 (emphasis added). This provision is limited to that part of N.C. Gen. Stat. § 113A-57(1) concerning land-disturbing activities “on, over, or under a lake or natural watercourse” (“This

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subdivision shall not apply to a land-disturbing activity in connection with the construction of facilities to be located on, over, or under a lake or natural watercourse.” N.C. Gen. Stat. § 113A-57(1).). Therefore, 15A N.C.A.C. 4B.0112 only applies to those activities which are specifically exempted from the “temporary and minimal” requirements of N.C. Gen. Stat. § 113A-57(1). Respondents made no argument to the trial court, and no argument is made on appeal, that this section of N.C. Gen. Stat. § 113A-57(1) applies in this case.

Neither the statutes nor the administrative code contain any similar authorization for the re-routing of fresh waters for land-disturbing activities not covered by the “on, over, or under” exemption of N.C. Gen. Stat. § 113A-57(1). Therefore, the re-routing of a portion of Banks Creek in itself constituted a violation of the provisions of the Act, and the Commission was without authority to approve a variance which contained this kind of land-disturbing activity within the mandatory trout buffer zone. The trial court erred in granting summary judgment in Respondents favor.

The dissent seems to imply that we are addressing an argument Petitioners abandoned at the trial level by considering the “on, over, or under” exemption of N.C. Gen. Stat. § 113A-57(1). However, we make no holding in this opinion on the argument Petitioners abandoned before the trial court. In fact, Petitioners stated “issue to be resolved” in their prehearing statement concerning this issue is: “G.S. 113A-57(1) states there can be no ‘land-disturbing activity in connection with the construction of facilities to be located on, over, or under a lake or natural watercourse.’ ” Although this issue is not before us on appeal, our analysis of this section in support of our reading of the contested portion of N.C. Gen. Stat. § 113A-57(1) clearly rejects Petitioner’s arguments before DENR on this point.

We conduct *de novo* review of matters of statutory construction. It is entirely appropriate to look to other related statutory provisions when making our intent based analysis of N.C. Gen. Stat. § 113A-57(1), which we do below. We find particularly confusing the dissent’s subsequent use of this portion of N.C. Gen. Stat. § 113A-57(1) to support its belief that “construction of a golf-course ‘over’ the stream falls within this specific exception.”

We find the dissent’s conclusion that the General Assembly intended to include golf courses within the “on, over, or under” exemption of N.C. Gen. Stat. § 113A-57(1) renders the protections provided by N.C. Gen. Stat. § 113A-57(1) virtually meaningless. As the

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ALJ reasonably interpreted this portion of the statute, the “on, over, or under” exemption logically refers to bridges, docks, [or conduits for sewage, water or electrical lines and other structures] that must *necessarily* “cross” or rest upon waters of North Carolina. Pursuant to the dissent’s interpretation, constructing any structure within the mandatory buffer zones would always be permitted so long as the waterway was diverted to run beneath the structure, and any such land-disturbing activity would be permitted without any regard to the effects of sedimentation caused by that construction. Furthermore, as the dissent itself argues, whether this section might provide specific grounds for the issuance or refusal of the variance is an issue not before us. Its only relevance is in assisting in the interpreting of those portions of N.C. Gen. Stat. § 113A-57(1) that are actually before us on appeal.

We hold that the trial court’s finding that “Mountain Air [would] only be conducting a ‘land-disturbing activity’ (i.e., an activity that ‘may cause or contribute to sedimentation’) while doing construction in the trout buffer” is not supported by substantial evidence. The trial court’s finding that there is “no evidence in the record that there [would] be the potential for or actual sedimentation after the work in the trout buffer [was] completed and stabilized” was in error for the same reason. The substantial evidence in the record shows that Mountain Air *will* continue to conduct activity in the trout water buffer zone after completion of initial construction of the project. Specifically, Mountain Air will have to periodically remove trees and tree canopy in order to maintain the functionality of the golf course, and maintenance and repair of culverts and piping will also be required.<sup>3</sup> “‘Completion of Construction or Development’ means that no further land-disturbing activity is required on a phase of a project *except that which is necessary for establishing a permanent ground cover.*” 15A N.C.A.C. 4A.0105(23) (emphasis added). Mountain Air’s ongoing activities within the trout waters buffer zone will serve to reduce the effectiveness of the buffer zone in preventing sedimentation, and cannot be interpreted as actions “necessary for establishing

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3. Assuming *arguendo* the dissent’s construction of the definition of “land-disturbing activities” is correct in its second footnote, our analysis is unchanged. Our use of the word “maintenance” was not meant to invoke N.C. Gen. Stat. § 113A-52(6). Our abridged citation to the definition of “land-disturbing activities” above, does not include the word “maintenance,” because we do not find it relevant to the definition on these facts. We hold that the activities Mountain Air will continue to perform constitute “land-disturbing activities” because they are a “use of the land by [a] person in . . . commercial development . . . that results in a change in the natural cover or topography and that may cause or contribute to sedimentation.” N.C. Gen. Stat. § 113A-52(6).

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a permanent ground cover.” We hold, as a matter of law, that this ongoing activity “*may* cause or contribute to sedimentation” (emphasis added), and thus constitutes “land-disturbing activity.” N.C. Gen. Stat. § 113A-52(6). We further hold that by definition, this continuing land-disturbing activity means the “construction or development” will not be “completed” unless and until the nine-hole golf course ceases operation, because Mountain Air (or any successor) will continue land-disturbing activities within the buffer zone in order to keep the golf course functional. 15A N.C.A.C. 4A.0105(23).

We reiterate that violations of the provisions N.C. Gen. Stat. § 113A-57(1) cannot be ignored even if great care is taken when violating the statute. The dissent argues that extraordinary measures will be taken in an attempt to minimize negative impact in the buffer zone area. However, removal of tree canopy may result in more rain reaching the ground in the buffer zone unimpeded, and thus with increased force. This may lead to erosion and sedimentation of the trout waters. Removal of trees obviously may lead to the same result. Tree stumps and root mass eventually rot, and thus no longer serve to either check the flow of water over the buffer zone, nor serve to bind the soil. This may lead to sedimentation of the trout waters. Repair or maintenance of piping may require the removal of damaged or deteriorating piping and replacement with new piping. Both the digging and the removal would likely require heavy machinery. However done, this process certainly may lead to sediment entering the trout waters. These constitute land-disturbing activities, N.C. Gen. Stat. § 113A-52(6), and, as they will be ongoing, by definition the construction phase of the project will continue as long as these land-disturbing activities are ongoing. 15A N.C.A.C. 4A.0105(23) (“‘Completion of Construction or Development’ means that no further land-disturbing activity is required on a phase of a project except that which is necessary for establishing a permanent ground cover.”).

The dissent argues that the above analysis constitutes inappropriate “fact-finding” by this Court. However, we are not required to determine whether Mountain Air’s activities have or will contribute to sedimentation, and we do not do so. What is clear to us, however, is that Mountain Air cannot prove that its activities *could never* contribute to sediment entering the trout waters. In light of this, we are compelled to hold that Mountain Air’s activities *may* contribute to sediment entering the trout waters.

The fact that Mountain Air has enclosed 1,868 feet of the trout waters in underground pipes does not save it from the plain language

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of the statute. Even assuming *arguendo* that piping 1,868 feet of the trout water is an effective means of preventing sedimentation from entering the stream, the statute regulates “land-disturbing activity.” We have already held that the land-disturbing activities utilized to place the pipe, including the re-routing of portions of Banks Creek, violated N.C. Gen. Stat. § 113A-57(1). Further, there has been no argument made, nor is it logical to conclude, that burying the stream and routing it through piping alters the classification of the stream from trout waters to another kind of watercourse.

Trout waters “shall have an *undisturbed buffer zone 25 feet wide* or of sufficient width to confine visible siltation within the twenty-five percent (25%) of the buffer zone nearest the land-disturbing activity, *whichever is greater*.” N.C. Gen. Stat. § 113A-57(1) (emphasis added). The statute makes no exception for trout waters that have been buried. The use of the piping itself could cause or contribute to sedimentation of Banks Creek. For example, a storm could lead to blockage of a pipe causing backup, and flooding across and over the piped portion of the creek, which could accumulate sediment that would then be deposited into the downstream portion of the creek where the piping ends. In the alternative, heavy rains causing flooding may be forced through unblocked piping with increased velocity due to the force exerted by the accumulating water on the upstream end of the piping. This would result in water exiting the piping downstream at increased velocity, which certainly presents the possibility of heightened erosion and sedimentation that would not occur absent the piping. We cannot say that the use of piping presents no hazzard of increased sedimentation. Therefore, we must find that the use of piping *may* cause increased sedimentation in the trout waters.

The dissent considers the above analysis speculative “concerning the possibility” that the piping may contribute to sedimentation, and argues that “[t]his speculation is beyond the scope of the permit before this Court.” That the piping will at some point in time deteriorate and require maintenance if it is to continue functioning is not speculation, since it will not last forever. We must apply the law before us. If Mountain Air continues to operate the golf course for a long enough period of time, it will eventually need to repair or replace the existing piping. This certainly may lead to sediment entering the trout waters. If Mountain Air ceases to operate the golf course, maintenance will fall to its successors in interest. Pipe maintenance will constitute future land-disturbing activity that has been guaranteed by the issuance of the permit before us.

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The dissent next focuses on the benefits of piping during heavy rains, as those portions of the trout waters enclosed within the piping will not suffer erosion (assuming no cracks or other problems with the piping). The point of our analysis is focused on the terminal end of the piping, and that portion of the trout waters into which the piped water will be deposited, not the banks of the trout waters that no longer exist because of the piping. Our holding does not mean that “a stream could never be piped because the possible risk of increased water velocity might cause erosion.” It does mean that the massive piping conducted in the case before us for the construction of a golf course violates the mandate of N.C. Gen. Stat. § 113A-57(1). It would defeat the purpose of N.C. Gen. Stat. § 113A-57(1) to assume the General Assembly intended for the “on, over or under” exemption to allow unfettered development over North Carolina’s trout waters so long as those waters are piped. Utilization of the “on, over or under” exemption to N.C. Gen. Stat. § 113A-57(1) for the piping necessary to construct a roadway over a trout water, for example, would be more consistent with the stated purpose of the Act.

Contrary to the dissent’s assertion, the express intent of the General Assembly as set forth in N.C. Gen. Stat. § 113A-51 is not to allow the protections it specifically enacted for trout waters to be as easily circumvented as they were in the case before us. The intent of the General Assembly as stated in N.C. Gen. Stat. § 113A-51 is much different than the single line from the five sentence preamble to which the dissent refers. When one reads N.C. Gen. Stat. § 113A-51 in its entirety, it is clear that the intent of the General Assembly was protection of our waters from the effects of sedimentation caused by unchecked development. The sentence the dissent quotes from the preamble<sup>4</sup> merely states the reasonable desire of the General Assembly to allow development along our waters so long as that development complies with the restrictions enacted to protect those waters.

We hold that the plain language of N.C. Gen. Stat. § 113A-57(1) prohibits the kind of land-disturbing activity conducted by Mountain

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4. The sentence the dissent relies on is preceded by the following language: “The sedimentation of streams, lakes and other waters of this State constitutes a major pollution problem. Sedimentation occurs from the erosion or depositing of soil and other materials into the waters, principally from construction sites and road maintenance. The continued development of this State will result in an intensification of pollution through sedimentation unless timely and appropriate action is taken. Control of erosion and sedimentation is deemed vital to the public interest and necessary to the public health and welfare[.]” N.C. Gen. Stat. § 113A-51.

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Air. The trial court erred in determining Mountain Air's activities conformed with the provisions of N.C. Gen. Stat. § 113A-57(1), and in entering summary judgment in favor of Respondents.

## III.

[2] Assuming *arguendo* that the language of N.C. Gen. Stat. § 113A-57(1) is in some manner ambiguous, we hold that Mountain Air's activities still violate the mandate of N.C. Gen. Stat. § 113A-57(1). As stated *supra*, "the Sedimentation Control Commission may approve plans which include land-disturbing activity along trout waters when the duration of said disturbance would be temporary and the extent of said disturbance would be minimal." N.C. Gen. Stat. § 113A-57(1).

When the plain language of a statute proves unrevealing, a court may look to other indicia of legislative will, including: "the purposes appearing from the statute taken as a whole, the phraseology, the words ordinary or technical, the law as it prevailed before the statute, the mischief to be remedied, the remedy, the end to be accomplished, statutes *in pari materia*, the preamble, the title, and other like means[.]" The intent of the General Assembly may also be gleaned from legislative history. Likewise, "later statutory amendments provide useful evidence of the legislative intent guiding the prior version of the statute." Statutory provisions must be read in context: "Parts of the same statute dealing with the same subject matter must be considered and interpreted as a whole." "Statutes dealing with the same subject matter must be construed *in pari materia*, as together constituting one law, and harmonized to give effect to each."

*Jefferson-Pilot*, 161 N.C. App. at 560, 589 S.E.2d at 181. "[T]he reviewing court must construe the statute in an attempt not to 'defeat or impair the object of the statute . . . if that can reasonably be done without doing violence to the legislative language.'" *Carolina Power & Light*, 358 N.C. at 518, 597 S.E.2d at 722. We hold that Respondents' interpretation of N.C. Gen. Stat. § 113A-57(1) cannot be adopted without defeating or impairing "the object of the statute," and "without doing violence to the legislative language [of that statute]."

Petitioners and Respondents take opposing views on the legislative intent behind N.C. Gen. Stat. § 113A-57(1). Petitioners argue that N.C. Gen. Stat. § 113A-57(1) is intended to regulate "land-disturbing activities," relying on the language of the statute. Respondents argue

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that N.C. Gen. Stat. § 113A-57(1) is intended to regulate “sedimentation,” relying on the title of Article 4 of Chapter 113A of the North Carolina General Statutes, in which N.C. Gen. Stat. § 113A-57(1) is found. Article 4 is entitled: “Pollution Control and Environment Sedimentation Pollution Control Act of 1973[.]” While the titles of statutes and acts may be consulted in order to assist in determining legislative intent when the language of the statute is ambiguous, *Jefferson-Pilot*, 161 N.C. App. at 560, 589 S.E.2d at 181, titles are not given the deference in interpretation that we give the actual language of the statute itself. *Wiggs v. Edgecombe County*, 361 N.C. at 322, 643 S.E.2d at 907; *Carolina Power & Light*, 358 N.C. at 518, 597 S.E.2d at 722.

The trial court concluded in its order, and Respondents argue in their brief: “The expressly stated intent of the General Assembly in the Sedimentation Act is to ‘permit development of this State to continue with the least detrimental effects from pollution by sedimentation.’ N.C. Gen. Stat. § 113A-51.” This direct quote from N.C. Gen. Stat. § 113A-51 represents a small portion of the preamble of the Act, and could give the false impression that the main focus of the Act is the promotion of development in North Carolina.

The preamble of the Act states in relevant part:

The sedimentation of streams, lakes and other waters of this State constitutes a major pollution problem. Sedimentation occurs from the erosion or depositing of soil and other materials into the waters, principally from construction sites and road maintenance. *The continued development of this State will result in an intensification of pollution through sedimentation unless timely and appropriate action is taken.* Control of erosion and sedimentation is deemed vital to the public interest and necessary to the public health and welfare, and expenditures of funds for erosion and sedimentation control programs shall be deemed for a public purpose. It is the purpose of this Article to provide for the creation, administration, and enforcement of a program and for the adoption of minimal mandatory standards which will permit development of this State to continue with the least detrimental effects from pollution by sedimentation.

N.C. Gen. Stat. § 113A-51 (2007) (emphasis added). Though it is clear the General Assembly intended to balance the benefits of development against the negative impact development has on the environment of North Carolina, the preamble makes clear that the General Assembly views unregulated development around the fresh waters of

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North Carolina as an environmental hazard, and that the Act was enacted to control and reduce sediment in the fresh waters of North Carolina through the regulation of development near those waters. This is a pollution control act, not a development promotion act, as Respondents seem to contend. This Court has stated that the “legislative intent behind the enactment of the SPCA . . . is to protect against the sedimentation of our waterways. *See* N.C. Gen. Stat. § 113A-51.” *McHugh v. North Carolina Dep’t of Envtl., Health & Natural Resources*, 126 N.C. App. at 476, 485 S.E.2d at 866. Our Court in *McHugh* also stated “G.S. 113A-57(1) deals with land-disturbing activity near a lake or natural watercourse.” *Id.* at 475, 485 S.E.2d at 865. The logical conclusion, supported by the language of the Act in general, and N.C. Gen. Stat. § 113A-57(1) in particular, is that the General Assembly intended, through N.C. Gen. Stat. § 113A-57(1), to control sedimentation *through the regulation of* land-disturbing activities. N.C. Gen. Stat. § 113A-57(1) is, therefore, specifically a land-disturbing activity regulation statute, aimed at controlling or preventing the flow of sediment into the fresh waters of North Carolina.

Further, the Commission is a division of the Land Quality Section of the Division of Land Resources, and shares offices with the Land Quality Section of the Division of Land Resources. 15A N.C.A.C. 4A.0101. Though the object of the Act is prevention or reduction of sediment reaching the fresh waters of North Carolina, this object is achieved through the regulation of land-based activities, which is conducted by agencies responsible for land-use regulation.

Respondents further argue that “North Carolina courts have consistently determined that the purpose of the Sedimentation Act is the control of sedimentation caused by development and construction activities, not the control of development and construction activities themselves.” A review of the appellate opinions of North Carolina does not support Respondents’ sweeping assertion. Respondents primarily rely on our Court’s opinion in *State ex rel. Lee v. Penland-Bailey Co.*, 50 N.C. App. 498, 274 S.E.2d 348 (1981). Respondents argue that *Penland-Bailey* stands for the proposition that the sole purpose of the Act is to control sedimentation and erosion, not land-disturbing activities. However, our Court in *Penland-Bailey* stated: “The legislative history of the act is consistent with the conclusion that it was for the purpose of controlling erosion and sedimentation, rather than *only* land-disturbing activities.” *Id.* at 501-02, 274 S.E.2d at 351 (emphasis added). In *Cox v. State*, 81 N.C. App. 612, 344 S.E.2d

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808 (1986), our Court decided whether the Act applied to land-disturbing activity that pre-dated the effective date of the Act. Our Court stated: "To accomplish the purpose of the Act, the Act and the regulations enacted pursuant to it may be applied to land-disturbing activities which occurred before the Act and regulations became effective." *Id.* at 615, 344 S.E.2d at 810. This is another clear statement from our Court that the Act regulates land-disturbing activities to control sediment and prevent it from entering the fresh waters of North Carolina. None of the other opinions cited by Respondents conflict with our holding that though the Act was passed for the purpose of controlling sedimentation and erosion, the purpose of N.C. Gen. Stat. § 113A-57(1) is to achieve these goals through the means of regulating development and land-disturbing activities along North Carolina's fresh waters.

Further, it is clear that the Act is, at its core, an environmental pollution control act. It is contained within Chapter 113A, which is titled: "Pollution Control and Environment." N.C. Gen. Stat. § 113A-57(1) is intended to control land-disturbing activities during development in order to prevent sediment from such activities from polluting the fresh waters of North Carolina. The stated and logical purpose of preventing the pollution of these waters is to provide healthy, safe environments, in as pristine a state as is practicable, for recreational uses, and plant and animal preservation. 15A N.C.A.C. 2B.0101(c)(1). The General Assembly decided that the protection of trout waters required specific, more stringent legislation, and included such legislation in N.C. Gen. Stat. § 113A-57(1); *see also* 15A N.C.A.C. 2B.0101(e)(1). The session law promulgating the trout waters buffer zone requirement is titled in relevant part: "An Act to Authorize [the Commission] . . . to Provide for a Setback for Land-Disturbing Activity Occurring Near Certain [*i.e.* certified] Trout Waters[.]" 1989 N.C. Sess. Laws, ch. 676, § 3. This title provides further evidence that the intent of the General Assembly in enacting the trout waters provision in N.C. Gen. Stat. § 113A-57(1) was to regulate land-disturbing activities, and to do so through the imposition of a mandatory, undisturbed "setback" or buffer zone.

Though the means utilized by N.C. Gen. Stat. § 113A-57(1) is control of land-disturbing activities to prevent sediment from entering trout waters, the clear intent of the General Assembly in including the trout water provision was the protection of trout and trout habitat in North Carolina, a fact recognized by the Commission through promulgating relevant regulations in the administrative code. *See*

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15A N.C.A.C. 2B.0101(e)(1) (“freshwaters protected for natural trout propagation and survival of stocked trout”); *see also* 15A N.C.A.C. 2B.0101(c)(1) (which encompasses trout waters and provides for the preservation of all fresh waters “for secondary recreation, fishing, aquatic life including propagation and survival, and wildlife”).

If we were to adopt Respondents’ interpretation of N.C. Gen. Stat. § 113A-57(1), the Commission could allow variances for development along and over all the trout waters of North Carolina so long as the trout waters were diverted through piping. This would eviscerate the mandate that: “Waters that have been classified as trout waters by the Environmental Management Commission *shall* have an *undisturbed* buffer zone 25 feet wide or of sufficient width to confine visible siltation within the twenty-five percent (25%) of the buffer zone nearest the land-disturbing activity, *whichever is greater*.” (Emphasis added). This interpretation, though it *might* prevent sedimentation, would allow for the destruction of North Carolina’s trout habitat. This the General Assembly could not have intended. Contrary to the assertion of the dissent, however, our holding does not “eliminate the variance provisions[,]” as the variance provisions survive our holding alive and well for the purposes for which they were enacted. These purposes clearly were not to render the protections of N.C. Gen. Stat. § 113A-57(1) virtually toothless, but to allow for reasonable “temporary and minimal” land-disturbing activity within the trout waters buffer zone when necessary for permanent construction activities conducted outside the trout waters buffer zone.

We hold that the language of N.C. Gen. Stat. § 113A-57(1) means what it clearly states: the mandated buffer zone for trout waters “shall” remain undisturbed, subject only to the exception that disturbance within that buffer zone may be conducted, with the proper issuance of a variance, so long as the “disturbance” within the buffer zone is both temporary and minimal, or the activity constitutes “a land-disturbing activity in connection with the construction of facilities to be located on, over, or under a lake or natural watercourse.” To allow development within the mandatory undisturbed twenty-five foot buffer zone established by N.C. Gen. Stat. § 113A-57(1) for trout waters would be to render the following language inoperative: “Waters that have been classified as trout waters . . . shall have an undisturbed buffer zone 25 feet wide [or wider].” We must construe the language of a statute, if possible, to give meaning to every word and provision, and not do “violence to the legislative language.” *Carolina Power & Light*, 358 N.C. at 518, 597 S.E.2d at 722; *see also*

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*Wilkins v. N.C. State Univ.*, 178 N.C. App. 377, 379, 631 S.E.2d 221, 223 (2006) (citation omitted).

Finally, when we construe the general provisions of N.C. Gen. Stat. § 113A-57(1) *in pari materia* with the more stringent provisions regarding trout waters, Respondents' interpretation of the statute defeats the clear purpose of the General Assembly to provide enhanced protections for trout waters by creating a mandatory buffer of *at least* twenty-five feet. Respondents agree that the "temporary and minimal" language in N.C. Gen. Stat. § 113A-57(1) evinces the intent of the General Assembly to provide *more* protection for trout waters. However, Respondents' argument, if adopted, would lead to the incongruous outcome of allowing permanent development within buffer zones protecting trout waters when permanent development within the buffer zones of fresh non-trout waters is prohibited. This cannot be what the General Assembly intended.

N.C. Gen. Stat. § 113A-57(1) allows land-disturbing activities near fresh non-trout waters to occur as close to those fresh waters as may be achieved so long as visible sediment will be contained "within the twenty-five percent (25%) of the buffer zone nearest the land-disturbing activity." This means that for fresh non-trout waters, it is possible that land-disturbing activities and permanent development may be permitted closer than twenty-five feet to fresh non-trout waters so long as they do not violate the "twenty-five percent" mandate. N.C. Gen. Stat. § 113A-57(1) includes no provision allowing permanent development within the seventy-five percent of the buffer zone that must remain sediment free protecting fresh non-trout waters, even if said land-disturbing activities would be temporary and minimal. We cannot hold that the General Assembly intended the "temporary and minimal" exception contained within the more stringent trout waters provision to allow development that obliterates the trout waters buffer zone entirely, when under the less stringent fresh non-trout waters provision, this type of development is prohibited. *Carolina Power & Light*, 358 N.C. at 518, 597 S.E.2d at 722; *Jefferson-Pilot*, 161 N.C. App. at 560, 589 S.E.2d at 181. While we agree that the "temporary and minimal" exception in the trout waters provision was included "to provide relief from the more stringent requirements [of the trout waters provision] in limited situations[.]" we cannot agree with the dissent that this "limited situations" exception was intended by the General Assembly to allow development along or over trout waters that would be prohibited along or over less restricted waters. Contrary to the argument made by the dissent, our holding sets no

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precedent concerning what development might be allowed “in” a trout stream pursuant to the “on, over, or under” exemption. Further, development is clearly allowed “around” trout waters, pursuant, of course, to the restrictions mandated by N.C. Gen. Stat. § 113A-57(1). N.C. Gen. Stat. § 113A-57(1) restricts development in certain ways and in certain areas; it does not prohibit development. It seeks a balance between development and preserving our waters, but as is made clear in the preamble, N.C. Gen. Stat. § 113A-51, the General Assembly chose to increase restrictions on development in order to protect North Carolina’s fresh waters.

Regulation of land-disturbing activities to prevent sedimentation of trout waters is merely a means to protect trout populations and habitat. Therefore, when the Commission, an ALJ, a superior court, or an appellate court of North Carolina reviews actions that implicate the trout waters provision of N.C. Gen. Stat. § 113A-57(1), the ultimate intent of the General Assembly—protection of trout populations and habitat—must be a primary objective and concern in reaching any final resolution concerning granting of a variance allowing temporary and minimal land-disturbing activities within a trout waters buffer zone.

We hold that the ultimate intent of the General Assembly in enacting the trout waters provisions within N.C. Gen. Stat. § 113A-57(1) was the protection of trout populations and habitat, through sedimentation control, by means of stricter regulation of land-disturbing activities near trout waters. N.C. Gen. Stat. § 113A-57(1) prohibits, even with approval from the Commission, land-disturbing activities within the mandated buffer zone—whether it be twenty-five feet or greater—that is not *both* temporary and minimal.<sup>5</sup> The acts of Mountain Air within the trout water buffer zone were not minimal, and will not be temporary. Further, even assuming *arguendo* that Mountain Air’s actions could somehow be interpreted as temporary and minimal land-disturbing activities, enclosing a trout water within nearly 2,000 feet of pipe cannot comply with the ultimate legislative intent of the trout water provision included in N.C. Gen. Stat. § 113A-57(1), the protection of trout populations and habitat. See 15A N.C.A.C. 2B.0101(e)(1).

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5. With the potential exception when express written permission is given by the Director of the Division of Land Resources, and with the further exception when the land-disturbing activity falls under the express exemption in N.C. Gen. Stat. § 113A-57(1) involving “construction of facilities to be located on, over, or under a lake or natural watercourse.”

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We reverse the order of the trial court, and remand to the trial court with instruction to enter summary judgment in favor of Petitioners on this issue. In light of our holdings in this opinion, we do not address Petitioners' additional arguments.

Reversed and remanded.

Judge BEASLEY concurs.

Judge STEELMAN dissents with a separate opinion.

STEELMAN, Judge dissenting.

I must respectfully dissent from the majority's decision to reverse the trial court's order granting respondent's motion for summary judgment. The fundamental purpose of N.C. Gen. Stat. § 113A-57(1) is to control the effects of sedimentation resulting from land-disturbing activities. Based upon a proper application of this principal, respondent issued a variance to Mountain Air, and the trial court properly affirmed respondent.

I. Additional Factual and Procedural Background

Before undertaking this project, Mountain Air obtained a Clean Water Act § 401 Water Quality Certification from the North Carolina Department of Environment and Natural Resources Water Quality Division. It also obtained a § 404 Wetlands Permit from the United States Army Corps of Engineers. Finally, it obtained approval of an erosion control plan pursuant to Article 4 of Chapter 113A of the General Statutes. The variance obtained from the Division of Land Resources (respondent) pursuant to N.C. Gen. Stat. § 113A-57(1) and 15A N.C.A.C. 4B.0125(c) contained fifteen separate conditions to which Mountain Air was required to adhere. The permit was described by Francis M. Nevils, Jr. (Nevils), Section Chief, Land Quality Section of the Division of Land Resources, as being "particularly stringent." The original permit prohibited work instream and within trout buffer zones "during the trout spawning season from October 15 through April 15." This latter condition was modified to prohibit work from January 15 through April 15. The reason for this modification was that there were no trout in Banks Creek where the proposed project was to be located, and only rainbow trout were present downstream from the proposed construction. The original permit restricted activity based upon the spawning season for brown

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trout, which were determined not to be downstream. The modification restricted instream work during the spawning season for rainbow trout.

On 12 November 2003, petitioners filed a petition for a contested case hearing challenging the issuance of a variance by respondent to Mountain Air, alleging six specific defects in the permit. On 12 January 2006, Administrative Law Judge James L. Conner, II granted summary judgment to petitioners based upon the holding that the activities of Mountain Air were neither temporary nor minimal. On 19 January 2007, respondent entered its final agency decision, rejecting the decision of Administrative Law Judge Conner. The Commission held that “[t]he Sedimentation Act does not prohibit all development around trout waters, as the Petitioners and ALJ Conner conclude. Instead, the Sedimentation Act regulates the effects of sedimentation on such waters, and imposes requirements to ensure that those sedimentation effects are temporary and minimal.”

Petitioners appealed from the final agency decision, taking two specific exceptions: (1) the ruling that “G.S. 113A-57(1) did not prevent activities ‘on, over, or under’ the trout stream[;]” and (2) the ruling that “the impacts of the activities in the trout buffer were temporary and minimal.” The trial court held that petitioners abandoned their first exception based upon the last sentence of N.C. Gen. Stat. § 113A-57(1). It further held that the buffer requirements of N.C. Gen. Stat. § 113A-57(1) only apply to land-disturbing activities during periods of construction or improvement to land and upheld respondent’s final agency decision. The trial court found that respondent did not hear new evidence, nor did the trial court consider new evidence.

On appeal to this Court, petitioners assert twenty-nine assignments of error challenging the trial court’s entry of summary judgment in favor of respondent. Unchallenged was the trial court’s second conclusion of law that petitioners had abandoned their exception concerning the last sentence of N.C. Gen. Stat. § 113A-57(1).

## II. Standard of Review

Since respondent did not adopt the decision of the administrative law judge, the trial court applied a *de novo* standard of review. N.C. Gen. Stat. § 150B-51(c) (2007). Since both the administrative law judge and the final agency decision resolved the case on summary judgment, the trial court was permitted to enter an order resolving the case under Rule 56 of the Rules of Civil Procedure pursuant to N.C. Gen. Stat. § 150B-51(d) (2007).

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The order of the trial court recites that the only issue decided was: “[w]hether the Commission improperly ruled that, based upon the stipulated facts in the contested case, the impacts of the project at issue in this matter were temporary and minimal under North Carolina’s Sedimentation Pollution Control Act . . . .” The order is structured with findings of fact and conclusions of law. However, the findings merely refer to the stipulations of the parties, the lack of evidence in the record, and that a variance with particularly stringent terms was issued. I would hold that these are not findings of fact in any traditional sense, *Quick v. Quick*, 305 N.C. 446, 451, 290 S.E.2d 653, 657 (1982), that the manifest intent of the trial court’s order was that there were no material issues of fact, and that respondent and Mountain Air were entitled to judgment as a matter of law. I would review this order as a summary judgment order, under a *de novo* standard of review. I therefore do not agree with the portions of the majority opinion referring to “findings of fact” and analyzing whether they were supported by competent evidence in the record.

### III. Statutory Purpose

At the heart of this case is the construction of the provisions of Article 4 of Chapter 113A of the General Statutes (Sedimentation Pollution Control Act of 1973). The preamble of this article clearly identifies the problem it intends to remedy: “[t]he sedimentation of streams, lakes and other waters of this State . . . .” N.C. Gen. Stat. § 113A-51 (2007). The mechanism employed to control sedimentation is the regulation of “land-disturbing activity.” This is defined in N.C. Gen. Stat. § 113A-52(6) (2007) as “any use of the land by any person in residential, industrial, educational, institutional or commercial development, highway and road construction and maintenance that results in a change in the natural cover or topography and that may cause or contribute to sedimentation.”

The purpose of this statute is to control sedimentation and to “*permit development of this State to continue with the least detrimental effects from pollution by sedimentation.*” N.C. Gen. Stat. § 113A-51 (emphasis added). Its purpose was not to limit or restrict development. *See McHugh v. N.C. Dept. of E.H.N.R.*, 126 N.C. App. 469, 476, 485 S.E.2d 861, 866 (1997) (“[T]he stated legislative intent behind the enactment of the [Sedimentation Pollution Control Act] . . . is to protect against the sedimentation of our waterways.” (citing N.C. Gen. Stat. § 113A-51)); *Cox v. State ex rel. Summers*, 81 N.C. App. 612, 615, 344 S.E.2d 808, 810 (“The purpose of the Act, G.S. 113A-50, *et seq.*, is to control erosion and sedimentation, rather than

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only land-disturbing activities.” (citation omitted)), *disc. review denied*, 318 N.C. 413, 349 S.E.2d 592 (1986).

The particular portion of Article 4 at issue is N.C. Gen. Stat. § 113A-57(1), which in its entirety reads as follows:

No land-disturbing activity subject to this Article shall be undertaken except in accordance with the following mandatory requirements:

(1) No land-disturbing activity during periods of construction or improvement to land shall be permitted in proximity to a lake or natural watercourse unless a buffer zone is provided along the margin of the watercourse of sufficient width to confine visible siltation within the twenty-five percent (25%) of the buffer zone nearest the land-disturbing activity. Waters that have been classified as trout waters by the Environmental Management Commission shall have an undisturbed buffer zone 25 feet wide or of sufficient width to confine visible siltation within the twenty-five percent (25%) of the buffer zone nearest the land-disturbing activity, whichever is greater. Provided, however, that the Sedimentation Control Commission may approve plans which include land-disturbing activity along trout waters when the duration of said disturbance would be temporary and the extent of said disturbance would be minimal. This subdivision shall not apply to a land-disturbing activity in connection with the construction of facilities to be located on, over, or under a lake or natural watercourse.

N.C. Gen. Stat. § 113A-57(1) (2007).

The majority’s construction of the provisions of Article 4 of Chapter 113A of the General Statutes and the regulations promulgated thereunder is based upon several flawed assumptions.

#### IV. No Development Concept

The first assumption made by the majority is that Chapter 113A requires that trout streams and trout buffer zones be maintained in a natural, pristine state in perpetuity. The majority ignores the express purpose of the Act: “It is the purpose of this Article to provide for the creation, administration, and enforcement of a program and for the adoption of minimal mandatory standards *which will permit development of this State to continue* with the least detrimental effects from pollution by sedimentation.” N.C. Gen. Stat. § 113A-51 (emphasis added).

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There is no authority in the General Statutes, or in the regulations for the majority's construction of these provisions, which if adopted would prohibit development in or around a trout stream. If such was the intent of the General Assembly, they certainly would have clearly so stated, and would not have chosen as the vehicle for accomplishing this goal a sedimentation control statute. Rather, the clear intent and purpose of N.C. Gen. Stat. § 113A-57(1) is to control sedimentation pollution in the waters of this State, and particularly in trout streams.

Further, the issue of whether N.C. Gen. Stat. § 113A-57(1) prevented activities "on, over, or under" a trout stream was abandoned by petitioners before the trial court. This ruling by the trial court was not assigned as error to this Court, and is thus not before this Court. N.C.R. App. P. 10(a) ("[T]he scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal . . . ."); *Atlantic Coast Mech., Inc. v. Arcadis, Geraghty & Miller of N.C., Inc.*, 175 N.C. App. 339, 346, 623 S.E.2d 334, 340 (2006) (holding that because plaintiff failed to assign error to the dismissal of one its claims, that issue was not properly before this Court).

The second assumption made by the majority is that in determining whether land-disturbing activities along a trout buffer zone are temporary and minimal, we must look to the scope of the entire project and not the sedimentation effects of the project. This was the critical area of dispute between Administrative Law Judge Conner and the Commission. The fundamental purpose of the Sedimentation Pollution Control Act of 1973 was to restrict the effects of sedimentation, not to restrict any type of development of real estate. In determining whether land-disturbing activities are temporary and minimal, the only standard relevant under Chapter 113A are the sedimentation effects.

The majority freely acknowledges that it is using a sedimentation control statute to require the maintenance of trout streams and trout stream buffers inviolate in perpetuity. No matter how laudable this goal may be, such a decision is reserved for the General Assembly, and not for the courts of this State.

Third, the majority appears to have difficulty reconciling the more stringent protection for trout waters and the variance provisions. These provisions were added by the General Assembly in 1989 N.C. Sess. Laws ch. 676, § 3. Since the variance provisions were enacted at the same time as the increased protection for trout waters,

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and are limited to trout waters, it is clear that the General Assembly decided that a mechanism was needed to provide relief from the more stringent requirements in limited situations. Such provisions in statutes are not uncommon or irreconcilable.

V. “Minimal” and “Temporary” Disturbance

The fundamental issue in this appeal is whether the trial court correctly concluded that respondent properly issued the variance to Mountain Air and ensured that any sedimentation that occurred during the construction of this golf course was “minimal” and “temporary” as required by N.C. Gen. Stat. § 113A-57(1).

A. Minimal Disturbance

The majority holds that Mountain Air’s actions of clearing all vegetation in approximately 160 feet of the buffer zone; removing trees and tree canopy along 2,763 feet of Banks Creek; and installing and re-routing the stream through underground piping do not constitute “minimal” land-disturbing activities. The majority cites the fact that the totality of the land-disturbing activity impacted twenty-two percent of the trout buffer zone, which violated 15A N.C.A.C. 4B.0125(c) and that there is nothing in the record to show Mountain Air received written approval to exceed those limits.<sup>6</sup>

The majority erroneously focuses on the entire scope of the construction project and the ultimate condition of the trout buffer zone after construction is completed rather than the sedimentation effects of these activities *during* construction. The variance issued by respondent stated: “In accordance with N.C. Gen. Stat. § 113A-57(1) and N.C. Admin. Code 15A 4B.0125(c), this letter will serve as written approval of the proposed encroachment into the trout water buffer zones, of tributaries to Banks Creek, as shown in the submittal dated August 6, 2003.” The 6 August 2003 proposal included: a tree removal

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6. 15A N.C.A.C. 4B.0125(c) provides that “[w]here a temporary and minimal disturbance is permitted as an exception by G.S. 113A-57(1), land-disturbing activities in the buffer zone adjacent to designated trout waters shall be limited to a maximum of ten percent of the total length of the buffer zone within the tract to be distributed such that there is not more than 100 linear feet of disturbance in each 1000 linear feet of buffer zone. *Larger areas may be disturbed with the written approval of the Director.*” (Emphasis added). The “Director” the regulation is referencing is the Director of the Division of Land Resources. *See* N.C. Gen. Stat. § 113A-54.1(c) (2007). In the instant case, the Director of the Division of Land Resources was James D. Simons. However Simons delegated this authority to Francis M. Nevils, Jr., Section Chief, Land Quality Section. Therefore, Mountain Air was required to have and received Nevils’ written approval before disturbing more than ten percent of the buffer zone located at Banks Creek.

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and tree canopy maintenance plan; drop inlet detail; pipe installation sequence; revised pipe sizes and velocity calculations; junction box replacement of plunge pool between holes 7 and 8; and plunge pool detail and related information. Respondent approved Mountain Air's 6 August 2003 proposal, but made it contingent on fifteen "particularly stringent" conditions. Further, the administrative record contains a map of the "Banks Creek Nine Holes Buffer Variance Plan" which refers to the exact percentage of the trout stream that would be affected by the vegetative clearing, tree removal, and underground piping. Nevils testified in his deposition that he considered and approved Mountain Air's plan, which showed the "cutting of some trees," grading, and placement of the pipes in the trout buffer zone. Based upon this evidence, respondent was aware of the exact dimensions of the construction that would occur at Banks Creek. The variance issued by respondent constituted "written approval of the Director" to exceed the limitations of 15A N.C.A.C. 4B.0125(c).

Further, a review of Mountain Air's 6 August 2003 variance proposal and the conditions contained in the variance issued ensured the sedimentation effects during the construction of the golf course were minimal. Mountain Air's tree removal plan included the following provisions: before removal commenced, individual trees to be removed would be flagged and respondent's representatives would be given an opportunity to inspect the flagged areas; trees would be cut above the ground leaving stumps and root mass intact; trees would be tied off and lifted directly out of the buffer where feasible or felled uphill and away from the stream bank; and sub-canopy vegetation would only be removed by hand. Likewise, Mountain Air's stormwater drainage installation plan detailed their efforts to "reduce the already minimal risk of sedimentation[.]" Mountain Air proposed to create "work teams" that would be tasked with specific work responsibilities and would be under supervision by a manager who had been certified under the state-sanctioned Clean Water Contractor program. Mountain Air also identified the order and methods to be used for each specific segment of pipe installation. The Sediment Control Crew would maintain stormwater and sediment pollution control logs. Mountain Air would also monitor the 10-day weather forecast on a daily basis and delay or stop any activity if significant rain was forecast for the following twenty-four hour period.

In addition, respondent conditioned the variance's approval on various "stringent" sedimentation pollution controls. Mountain Air had to monitor the weather forecast three days in advance of any

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land-disturbing activity, and the activity could not begin if within twenty-four hours there was a fifty percent chance of precipitation. All disturbed areas in the buffer zone had to be stabilized with an adequate temporary ground cover at the end of each workday. All materials excavated during any work within the buffer zone had to be deposited twenty-five feet from the top of the stream bank. A person qualified in erosion and sedimentation control was required to be present during all land-disturbing activities within the buffer zone. Tree removal could not begin until the site had been stabilized and could only be accomplished with equipment that minimized disturbance to the area. The approved erosion and sedimentation control plan for the golf course construction was required to have “adequately sized measures” and to include “the use of skimmer basins, skimmer traps or flocculant(s) and level spreaders or other means to create dispersed flow where appropriate to reduce sedimentation and turbidity.” Mountain Air was also prohibited from working in the buffer zone during the rainbow trout spawning season as an additional measure to protect their habitat.

Both Mountain Air’s variance proposal and respondent’s “particularly stringent” conditions of the variance ensured that erosion and sedimentation pollution was “minimal” during the period of construction along Banks Creek.

### B. Temporary Disturbance

The majority also holds that Mountain Air’s land disturbing activities are not temporary because “evidence in the record shows that Mountain Air will continue to conduct activity in the trout waters buffer zone after completion of all construction.” The majority focuses on the fact that Mountain Air will have to periodically remove trees and tree canopy, and maintenance and repair the piping in order to preserve the functionality of the golf course.

We note that the requirements of N.C. Gen. Stat. § 113A-57(1) only apply to land-disturbing activities<sup>7</sup> during periods of construction and not to activities which occur once construction has been completed. See N.C. Gen. Stat. § 113A-57(1) (providing that “No land-disturbing

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7. The definition of “land-disturbing activities” references the word maintenance. See N.C. Gen. Stat. § 113A-52(6) (“[A]ny use of the land by any person in residential, industrial, educational, institutional or commercial development, *highway and road construction and maintenance* that results in a change in the natural cover or topography and that may cause or contribute to sedimentation.” However, the structure of this sentence makes it clear that the maintenance it is referring to is highway and road maintenance, not maintenance in general.

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activity *during periods of construction or improvement to land* shall be permitted in proximity to a lake or natural watercourse unless a buffer zone is provided along the margin of the watercourse . . . .” (emphasis added)); N.C. Gen. Stat. § 113A-51 (“Sedimentation occurs from the erosion or depositing of soil and other materials into the waters, principally from *construction sites* and road maintenance.”).

Even assuming *arguendo* that the requirements of N.C. Gen. Stat. § 113A-57(1) extend beyond the completion of the construction project, no activity Mountain Air may have to conduct could be considered “land-disturbing.” Mountain Air’s “Tree Canopy Maintenance Plan” contained the following provisions: all trees to be removed would be flagged in the field; all trees would be cut using hand tools; all trees greater than 3" in diameter at breast height will be cut and left in the buffer area; trees equal or less than 3" at breast height will be removed from the buffer by hand; all trees will be cut above the ground, leaving stumps and root mass intact; and subcanopy improvement will be done using hand tools. The conditions in the variance regarding tree removal would also still be applicable to Mountain Air’s conduct.

The majority holds as a matter of law “that this ongoing activity ‘*may* cause or contribute to sedimentation[,]’” citing the last clause in the definition of “land-disturbing activity” as found in N.C. Gen. Stat. § 113A-52(6). However, there is no evidence in the record to support this assertion. When the majority asserts that the removal of the tree canopy and the removal of the trees may lead to more rain reaching the ground causing sedimentation pollution to enter the trout stream, it is engaging in fact-finding. It is not the role of the appellate courts to engage in fact-finding. *See Godfrey v. Zoning Bd. of Adjustment*, 317 N.C. 51, 63, 344 S.E.2d 272, 279 (1986) (“Fact finding is not a function of our appellate courts.”).

While a “land-disturbing activity” includes “a change in the natural cover or topography,” it must also be one that “may cause or contribute to sedimentation.” N.C. Gen. Stat. § 113A-52(6). When a wooded area is cleared, stumps are removed, and machinery is used to remove trees, clearly sedimentation may occur. However, when no stumps are removed, the trees over 3" in diameter are not removed, and all cutting is to be done with hand tools, I cannot fathom how this could cause or contribute to sedimentation. The tightly regulated maintenance procedures do not constitute “land-disturbing activities.” Further, the majority engages in rank speculation concerning

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the possibility of the removal and replacement of damaged piping. This speculation is beyond the scope of the permit before this Court. Clearly, if such activity was to take place in the future, and it involved a “land-disturbing activity” as defined in N.C. Gen. Stat. § 113A-52(6), then the provisions of N.C. Gen. Stat. § 113A-57 would have to be complied with. Such issues are for another court on another day.

The majority makes an alternative assertion that there is a possibility that heavy rains resulting in flooding would increase the water velocity in the piped portion of the creek, which in turn presents the possibility of heightened erosion and sedimentation downstream. However, the majority ignores the obvious result of the piping, that there would be no erosion in the piped area during times of flooding. Under the majority's theory, a stream could never be piped because the possible risk of increased water velocity might cause erosion. Such a holding would have devastating results for development in North Carolina, and is contrary to the express intent of the General Assembly as set forth in N.C. Gen. Stat. § 113A-51.

The issuance of the variance does not violate the requirements of N.C. Gen. Stat. § 113A-57(1) that the effects of any land-disturbing activity in the trout buffer zone be temporary.

#### VI. Statutory Construction

##### A. Development in Trout Waters

In conclusion, the majority purports to construe the provisions of Article 4 *in para materia* to reach the conclusion that the variance provisions of N.C. Gen. Stat. § 113A-57(1) cannot “allow development that obliterates the trout waters buffer zone entirely, when under the less stringent fresh non-trout waters provision, this type of development is prohibited.” I disagree with this analysis for several reasons.

First, it ignores completely the last sentence of N.C. Gen. Stat. § 113A-57(1), which specifically permits “land-disturbing activity in connection with the construction of facilities to be located on, over, or under a lake or natural watercourse.” N.C. Gen. Stat. § 113A-57(1). This provision applies both to trout and non-trout waters and was in the statute prior to the 1989 amendments. The construction of a golf-course “over” the stream falls within this specific exception.

Second, with a stroke of a pen, the majority purports to eliminate the variance provisions, which were enacted at the same time as the more stringent trout buffer requirements.

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Finally, as noted above, the purpose of Article 4 of Chapter 113A is not to prohibit development, but rather to regulate the effects of land-disturbing activity which leads to sedimentation in the waters of North Carolina.

B. Deference to Agency Interpretation

It must be noted that respondent's interpretation of the purpose and meaning of N.C. Gen. Stat. § 113A-57(1) should traditionally be given some deference by the courts in light of the fact that respondent was the agency chosen to administer this statute. *See County of Durham v. N.C. Dep't of Env't & Natural Resources*, 131 N.C. App. 395, 396, 507 S.E.2d 310, 311 (1998) (“[E]ven when reviewing a case de novo, courts recognize the long-standing tradition of according deference to the agency’s interpretation” of a statute it administers. (citations omitted)), *disc. review denied*, 350 N.C. 92, 528 S.E.2d 361 (1999). This proposition is still legally sound despite the General Assembly’s addition of N.C. Gen. Stat. § 150B-51(c) to the North Carolina Administrative Procedure Act in 2000, which provides that “in a contested case in which an administrative law judge made a decision, in accordance with G.S. 150B-34(a), and the agency does not adopt the administrative law judge’s decision, the court shall review the official record, de novo, and . . . shall not give deference to any prior decision made in the case . . . .” N.C. Gen. Stat. § 150B-51(c); *Rainey v. N.C. Dep’t of Pub. Instruction*, 361 N.C. 679, 652 S.E.2d 251 (2007). In *Rainey*, our Supreme Court interpreted N.C. Gen. Stat. § 150B-51(c) and held that the subsection “refers only to the agency’s decision in the specific case before the court” and that the trial court is not barred from “considering the agency’s expertise and previous interpretations of the statutes it administers, as demonstrated in rules and regulations adopted by the agency or previous decisions outside of the pending case.” *Id.* at 681, 652 S.E.2d at 252. The rationale behind its holding was as follows:

If the *only* authority for the agency’s interpretation of the law is the decision in that case, that interpretation may be viewed skeptically on judicial review. If the agency can show that the agency has consistently applied that interpretation of the law, if the agency’s interpretation of the law is not simply a “because I said so” response to the contested case, then the agency’s interpretation should be accorded the same deference to which the agency’s construction of the law was entitled under prior law.

*Id.* at 681-82, 652 S.E.2d at 252-53 (quotation omitted). It is clear from the record that respondent has repeatedly determined that based

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upon the purpose of the Act found in the preamble to N.C. Gen. Stat. § 113A-50 *et seq.*, and its express grant of authority to “approve plans which include land-disturbing activity along trout waters when the duration of said disturbance would be temporary and the extent of said disturbance would be minimal[,]” that it is authorized to grant variances when the impact from sedimentation would be temporary and minimal.<sup>8</sup> Because respondent can show that the agency has consistently applied this interpretation of the law, and because its interpretation is not simply a “because I said so” response, respondent should be afforded deference. However, the trial court, applying a *de novo* standard of review and without giving any deference to the final agency decision, interpreted the language of the Act in the same manner as respondent.

I would hold that because the sedimentation effects of Mountain Air’s construction project were temporary and minimal, respondent properly issued the variance to Mountain Air. The trial court did not err by granting summary judgment in favor of respondent. I would affirm the trial court’s order.

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NORTH CAROLINA DEPARTMENT OF REVENUE, PETITIONER v.  
BILL DAVIS RACING, RESPONDENT

No. COA08-1387

(Filed 17 November 2009)

**1. Taxation— Tax Review Board decision—standard of review**

The trial court applied the wrong standard of review to a Tax Review Board decision where the question under the applicable standard was the legal correctness of the Tax Review Board’s decision, but the court’s findings went far beyond the findings made below and it was clear that the additional findings had a definite effect on the trial court’s decision. N.C.G.S. § 150B-51(c) does not apply.

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8. In his deposition, Nevils testified that in the two years prior to the issuance of the variance to Mountain Air, respondent had issued “four or five” trout buffer variances and that there were a number under review at that time. Nevils further testified that at least one of the variances previously issued was comparable to the one issued to Mountain Air.

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**2. Taxation— qualification for credits—findings not sufficient**

The trial court applied an incorrect substantive standard to the question of whether a respondent that was engaged in NASCAR activities was entitled to receive certain tax credits available to taxpayers engaging in manufacturing. The proper construction of the relevant statutory provision requires the use of a three step analysis for identifying the “primary business” or “primary activity” in which a particular entity is engaged, with detailed findings and conclusions at all stages. Here, the decisions of both the trial court and the Assistant Revenue Secretary were deficient and the matter was remanded for a new administrative hearing.

Appeal by respondent from order entered 9 July 2008 by Judge James E. Hardin, Jr., in Wake County Superior Court. Heard in the Court of Appeals 22 April 2009.

*Attorney General Roy Cooper, by Assistant Attorney General Tenisha S. Jacobs for petitioner.*

*Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by William G. McNairy and Elizabeth V. LaFollette for respondent.*

ERVIN, Judge.

Bill Davis Racing (Respondent) appeals from an order entered 9 July 2008 reversing the Tax Review Board’s Administrative Decision No. 508, and ordering that Respondent is “liable for the franchise tax, interest and penalties in the amount set forth in Final Decision Docket No. 06-217 entered by the [Assistant] Secretary [of Revenue] on 15 December 2006.” We reverse and remand the trial court’s order.

Factual Background

Respondent Bill Davis Racing is a North Carolina S-Corporation that operates facilities in High Point and Thomasville. Respondent was engaged in several business activities and “employed approximately 133 employees and purchased machinery and equipment totaling more than \$1.8 million for use at its North Carolina facilities” during the relevant time period.<sup>1</sup> For example, Respondent “owned and operated three NASCAR racing teams” during that time. In addition, Respondent “manufactured competitive cars, car bodies, and engines

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1. For purposes of this appeal, the relevant time period is the 2000, 2001, and 2002 tax years.

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at its North Carolina facilities for its own use in NASCAR racing events.” Respondent earned total revenues during the relevant time period of \$85,778,485.00, “the majority of which was from NASCAR sponsorships, winnings, and royalties.”

In June 2000, Respondent became interested in obtaining tax credits under the William S. Lee Quality Jobs and Expansion Act (Lee Act). On 16 June 2000, Respondent sought and eventually obtained a change in its North American Industrial Classification System (NAICS) Code<sup>2</sup> “from 7948, a code that describes businesses engaged in the promotional and managerial aspects of automobile racing teams, to 3711, a code that relates to automobile manufacturing.” After receiving the revised NAICS Code, Respondent submitted a “Participation Request” to the Secretary of Commerce seeking certification of its eligibility to receive Lee Act tax credits for the 1999 tax year. On 9 August 2000, the Secretary of Commerce issued Respondent a “Certificate of Eligibility.” Upon receipt of this Certificate of Eligibility, Respondent filed an amended 1999 corporate tax return in which it “report[ed] eligible tax credits of \$49,500.00 for creating jobs and \$10,570.00 for investing in machinery and equipment.”

Respondent submitted similar “Participation Requests” to the Secretary of Commerce for 2000 and 2001 and received “Certificates of Eligibility” in response to both requests.<sup>3</sup> On its 2000 corporate tax return, Respondent claimed “the 1999 eligible credit amounts for creating jobs and for investing in machinery and equipment against income tax and allocated the income tax credits to its shareholders.” In addition, Respondent “reported eligible tax credits of \$184,500.00 for creating jobs and \$46,280.00 for investing in machinery and equipment during 2000.” Respondent claimed “the 2000 eligible credit amount for investing in machinery and equipment against its franchise tax[;] . . . claimed the first installment of that credit against its franchise tax liability[;]” and claimed “the 2000 eligible credit amount for creating jobs against its income tax and allocated the income tax credit to its shareholders” on its 2001 corporate return. Respondent “reported eligible tax credits of \$36,000.00 for creating jobs and \$54,245.00 for investing in machinery and equipment during 2001.” On its 2002 corporate tax return, Respondent claimed “the 2001 eligible

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2. The NAICS Code was originally referred to as the Standard Industrial Classification (SIC) Code.

3. Respondent did not submit a similar request to the Department of Commerce for 2002 because the process for claiming Lee Act tax credits had been changed by that point.

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credit amount for creating jobs against its franchise tax[;]" claimed "the first installment of that credit and the second installment of the 2000 credit for investing in machinery and equipment against its franchise tax liability[;]" and claimed the "2001 eligible credit amount for investing in machinery and equipment against its income tax and allocated the income tax credit to its shareholders."

After conducting an examination, the Petitioner Department of Revenue "determined that [Respondent] did not satisfy all of the general eligibility requirements needed to qualify for [Lee Act] credits and disallowed the installments of the credits for creating jobs and for investing in machinery and equipment claimed by [Respondent] against its franchise tax liability for tax years 2001 and 2002 and [disallowed] the credits for creating new jobs and investing in machinery and equipment that [Respondent] had allocated to its shareholders to claim against income tax liability for tax years 2000 through 2002." As a result, on 31 August 2004, Petitioner issued notices "assessing additional tax, interest, and negligence penalties" against Respondent and notices of assessments "against [Respondent's] shareholders for calendar years 2000 through 2002."<sup>4</sup>

On 29 September 2004, Respondent objected to the proposed franchise tax assessments and requested a hearing before the Secretary of Revenue. On 15 December 2006, Eugene J. Cella, Assistant Secretary of Revenue, entered a Final Decision. In his Final Decision, the Assistant Secretary determined that "whether an activity of a service[-]based company, such as [Respondent] is its primary business is best measured by the value of the company's receipts or revenues generated from that activity." The Assistant Secretary noted that the majority of Respondent's revenues were derived "from NASCAR sponsorships, winnings, and royalties," so that Respondent's "primary business is NASCAR racing," a business which was not eligible to receive credits under the Lee Act. After applying Petitioner's "penalty waiver policy," the Assistant Secretary determined to "waive one-half of the assessed negligence penalty upon payment of the total tax, interest, and one-half of the penalty imposed as a result of this Final Decision."

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4. The Department and the affected shareholders have agreed to be bound by the outcome of Respondent's challenge to the assessment levied by the Department against Respondent.

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On 16 March 2007, Respondent filed a Petition For Review of Final Decision with the Tax Review Board.<sup>5</sup> On 12 July 2007, the Tax Review Board entered an Administrative Decision in which it concluded that “the findings of fact made by the Assistant Secretary were not supported by competent evidence in the record, that based upon the findings of fact, the Assistant Secretary’s conclusions of law were not fully supported by the findings of fact, and that the final decision of the Assistant Secretary was not supported by the conclusions of law.” The Tax Review Board did not specify the exact findings of fact which it believed to lack adequate evidentiary support or state the reasons that it believed that the Assistant Secretary’s factual findings failed to properly support his conclusions of law. The Tax Review Board reversed the Assistant Secretary’s Final Decision.

On 7 November 2007, the Department filed a Petition for Judicial Review in Wake County Superior Court in which it requested the Superior Court to overturn the Tax Review Board’s Administrative Decision. On 14 July 2008, the trial court entered an Order containing extensive findings of fact and conclusions of law in which it determined, among other things, that “Respondent’s primary business was the owning and operating of race car teams;” that “Respondent’s primary business was not an eligible business under the Lee Act for the Years at Issue,<sup>6</sup> and Respondent was therefore not entitled to any credits claimed under the Lee Act;” that “Respondent failed to meet its burden of proving it is eligible to claim Lee Act tax credits;” that “[t]he penalties were properly assessed by the Department in this matter;” that “the Secretary properly waived 50% of the assessed penalties under the good compliance provisions contained in the Department’s penalty waiver policy;” that “[t]he findings of fact in the Final Decision are supported by the substantial evidence admissible

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5. At the time that this matter was under consideration in the administrative process, the Tax Review Board provided a forum in which taxpayers could obtain review of Department decisions with which they disagreed. Effective 1 January 2008, the General Assembly substantially modified the procedures by which taxpayers were entitled to obtain review of adverse Department decisions by repealing the statutes that created and made reference to the Tax Review Board and enacting a new administrative review process that provided for an assessment by the Department, N.C. Gen. Stat. § 105-241.9; a request for departmental review by the taxpayer, N.C. Gen. Stat. § 105-241.11; a final determination by the Department, N.C. Gen. Stat. § 105-241.14; review through the use of the contested case provisions of Article 3 of the Administrative Procedure Act, N.C. Gen. Stat. § 105-241.15; and judicial review in the Superior Court of Wake County “in accordance with Article 4 of Chapter 150B of the General Statutes.” N.C. Gen. Stat. § 105-241.16.

6. “Years at Issue” is a term used in the trial court’s order to refer to the 2000 through 2002 tax years.

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under N.C. Gen. Stat. §§ 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted;” that “‘[t]he substantial rights of [the Department] have been prejudiced because the Administrative Decision of the Tax Review Board is unsupported by substantial admissible evidence in view of the entire record as submitted and, upon review of the whole record, the decision should be reversed;” that “[t]he substantial rights of the [Department] have been prejudiced because the Administrative Decision of the Tax Review Board is affected by error of law and, upon *de novo* review should be reversed;” and that the Department “is entitled to the relief sought in its Petition for Judicial Review.” As a result, the trial court ordered that “the Tax Review Board’s Administrative Decision No. 508 is **REVERSED** in its entirety; and that Respondent is liable for the franchise tax, interest and penalties in the amount set forth in Final Decision Docket No. 06-217 entered by the [Assistant] Secretary on 15 December 2006.” Respondent noted an appeal to this Court from the trial court’s decision.

Standard of Review

[1] “This Court’s review of ‘a superior court order entered upon review of an administrative agency decision, . . . [involves a] two-fold task: (1) [to] determine whether the trial court exercised the appropriate scope of review and, if appropriate; (2) to decide whether the trial court did so properly.” *In re NC IDEA*, — N.C. App. —, —, 675 S.E.2d 88, 94-95 (2009) (quoting *County of Wake v. N.C. Dept. of Env’t & Natural Res., et al.*, 155 N.C. App. 225, 233-34, 573 S.E.2d 572, 579 (2002)). As a result, the first issue that the Court is required to address is the extent to which the trial court applied the appropriate standard in reviewing the Tax Review Board’s decision. After carefully reviewing the record and the applicable law, we conclude that the trial court failed to apply the correct standard of review.

The system that existed for reviewing disputes over tax liability issues at the time that the present controversy began provided that, “[i]f the Secretary discover[s] that any tax is due from a taxpayer, the Secretary must notify the taxpayer in writing of the kind and amount of tax due and of the Secretary’s intent to assess the taxpayer for the tax.” N.C. Gen. Stat. § 105-241.1(a) (2006). “A taxpayer who objects to a proposed assessment of tax is entitled to a hearing before the Secretary . . . .” N.C. Gen. Stat. § 105-241.1(c) (2006). “When a taxpayer files a timely request for a hearing, the Secretary must set the time and place at which the hearing will be conducted

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and must notify the taxpayer of the designated time and place . . . .” N.C. Gen. Stat. § 105-241.1(c) (2006). “Within 90 days after the Secretary conducts a hearing on a proposed assessment, the Secretary must make a decision on the proposed assessment and notify the taxpayer of the decision,” which “must assess the taxpayer for the amount of any tax the Secretary determined to be due.” N.C. Gen. Stat. § 105-241.1(c) (2006).

“Without having to pay the tax or additional tax assessed by the Secretary, . . . any taxpayer may obtain from the Tax Review Board an administrative review with respect to the taxpayer’s liability for the tax or additional tax assessed by the Secretary.” N.C. Gen. Stat. § 105-241.2(a) (2005). “Within 90 days after conducting a hearing . . . , the [Tax Review] Board shall confirm, modify, reverse, reduce, or increase the assessment or decision of the Secretary . . . .” N.C. Gen. Stat. § 105-241.2(b2) (2005). “Any person who is aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of the decision under this Article, unless adequate procedure for judicial review is provided by another statute, in which case review shall be under such other statute.” N.C. Gen. Stat. § 150B-43.<sup>7</sup> Thus, under the scheme for reviewing tax appeals in existence at the time that Respondent’s tax liability was under consideration at the administrative level, the question before the trial court was the legal correctness of the Tax Review Board’s decision to overturn the Assistant Secretary’s Final Decision.

“According to well-established law, it is the responsibility of the administrative body, not the reviewing court, ‘to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence.’ ” *NC IDEA*, — N.C. App. at —, 675 S.E.2d at 94 (quoting *Com’r of Ins. v. Rate Bureau*, 300 N.C. 381, 406, 269 S.E.2d 547, 565 (1980)). For that reason, the trial court was subject to

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7. According to the decision of the Supreme Court in *In re Halifax Paper*, 259 N.C. 589, 131 S.E.2d 441 (1963), a predecessor to current N.C. Gen. Stat. § 150B-143 allowed agencies to appeal from adverse administrative decisions. Unlike the statute at issue in *Halifax Paper*, however, N.C. Gen. Stat. § 150B-43 authorizes a request for judicial review by a “person who is aggrieved by the final decision in a contested case.” Prior to the enactment of 2007 N.C. Sess. L. c. 491, s. 2, which repealed former N.C. Gen. Stat. § 150B(e)(6) effective 1 January 2008, the Department of Revenue was exempt from the contested case provisions of the Administrative Procedure Act. However, given that Respondent has not contested Petitioner’s standing to seek review of the Tax Review Board’s decision, we will assume that such authority exists under the statutory provisions quoted in the text.

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certain well-defined limits in reviewing the Tax Review Board's decision. Pursuant to N.C. Gen. Stat. § 150B-51(b), the trial court was required to evaluate the Tax Review Board's decision under the following standard of review:

Except as provided in subsection (c) of this section, in reviewing a final decision, the court may affirm the decision of the agency or remand the case to the agency or to the administrative law judge for further proceedings. It may also reverse or modify the agency's decision, or adopt the administrative law judge's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional provisions;
- (2) In excess of statutory authority or jurisdiction of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Unsupported by substantial evidence admissible under [N.C. Gen. Stat. §§ 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
- (6) Arbitrary, capricious, or an abuse of discretion.

"The first four grounds for reversing or modifying an agency's decision—that the decision was 'in violation of constitutional provisions,' 'in excess of statutory authority or jurisdiction of the agency,' 'made upon unlawful procedure,' or 'affected by other error of law,' N.C. Gen. Stat. § 150B-51(b)(1)-(4)—are law-based inquiries." *NC IDEA*, — N.C. App. at —, 675 S.E.2d at 94 (citing *N.C. Dept. of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 894 (2004)). On the other hand, "[t]he final two grounds—that the decision was 'unsupported by substantial evidence . . . in view of the entire record' or 'arbitrary or capricious,' N.C. Gen. Stat. § 150B-51(b)(5),(6)—involve 'fact-based' inquiries." *Id.* "In cases appealed from administrative agencies, '[q]uestions of law receive *de novo* review,' whereas fact-intensive issues 'such as sufficiency of the evidence to support [an agency's] decision are reviewed under the whole-record test.'" *Id.* (quoting *In re Appeal of the Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

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The trial court made a number of explicit comments relevant to the issue of the scope of review that it employed in reviewing the Tax Review Board's Administrative Decision. At one point, the trial court stated that "[t]he findings of fact in the [Assistant Secretary's] Final Decision are supported by . . . substantial evidence admissible under N.C. Gen. Stat. §§ 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted." Furthermore, the trial court stated that "[t]he substantial rights of Petitioner have been prejudiced because the Administrative Decision of the Tax Review Board is unsupported by substantial admissible evidence in view of the entire record as submitted and, upon review of the whole record, the decision should be reversed." At another point, the trial court stated that "[t]he substantial rights of the Petitioner have been prejudiced because the Administrative Decision of the Tax Review Board is affected by error of law and, upon *de novo* review should be reversed." Finally, the trial court stated that "[t]he Final [Agency] Decision was not in violation of constitutional provisions, was not in excess of Petitioner's statutory authority or jurisdiction, was not affected by error in law, was not unsupported by substantial evidence in view of the entire record as submitted, and was not arbitrary or capricious, and upon review of the whole record and *de novo* review, the Final Decision should be sustained." Based upon this language, standing alone, we might be able to conclude that the trial court correctly applied a "substantial evidence" standard of review to "evidence-based" issues and a *de novo* standard of review to "law-based" issues. However, the fact that the trial court included extensive findings of fact in its order compels us to reach a different conclusion on the standard of review issue.

The mere existence of findings of fact in the trial court's order, without more, might not necessitate a conclusion that it applied an incorrect standard of review. For example, we might not be compelled to reach such a conclusion in the event that the trial court had simply recited or summarized the factual findings made by the administrative agency for ease of reading.<sup>8</sup> Unfortunately, however, the trial

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8. Although both the Assistant Secretary and the trial court attempted to separately state findings of fact and conclusions of law, certain of the conclusions of law made by both the Assistant Secretary and the trial court are, in reality, findings of fact. Although this intermingling of findings of fact and conclusions of law has made review of the relevant orders more difficult, such an error is not, in and of itself, grounds for an award of appellate relief. *State ex rel. Utilities Com'm v. Eddleman*, 320 N.C. 344, 352, 358 S.E.2d 339, 346 (1987) (stating that "mislabeling . . . of [] findings and conclusions will not be [] fatal to [an] order" "[a]s long as 'each link in the chain of reasoning' appears in the . . . order") (quoting *Coble v. Coble*, 300 N.C. 708, 714, 268 S.E.2d 185, 190 (1980)).

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court's order contains numerous findings of fact that do not appear in the Assistant Secretary's Final Decision.<sup>9</sup> For example, Finding of Fact No. 7 in the trial court's order states that "[t]he vast majority of revenue Respondent earned during the Years at Issue was from NASCAR sponsorships, winnings, and royalties." Although Finding of Fact No. 6 in the Assistant Secretary's Final Decision discussed the sources of Respondent's revenues, it merely stated that "the majority . . . was from NASCAR sponsorships, winnings, and royalties." Similarly, Finding of Fact No. 10 in the trial court's order states that, "[b]y letter dated 16 June 2000, Respondent instructed the Employment Security Commission to reclassify Respondent's [NAICS] code from 7948 to 3711." Although Finding of Fact No. 8 in the Assistant Secretary's Final Decision contains similar language, the word "instructed" is noticeably absent from the equivalent finding in the Final Decision. Along the same lines, Finding of Fact No. 15 in the trial court's order states that "NAICS is a self-identification system, under which each business decides for itself whether its NAICS code is accurate." There is no equivalent finding in the Final Decision. Finally, the trial court's order contains a number of findings discussing the preparation and contents of Respondent's federal income tax returns:

28. George Kirtley, C.P.A. was listed as the paid preparer on both Respondent's United States Income Tax Returns for an S-Corporation and North Carolina S-Corporation Franchise and Income Tax Returns for each of the Years at Issue. Administrative Record TRB-7, Exhibit No. 1 through 6.
29. Respondent listed "NASCAR Racing" as its "principal business activity" on its United States Income Tax Return for an S-Corporation for each of the Years at Issue. Administrative Record TRB-7, Exhibit No. 4 through 6.
30. Respondent listed "Auto Racing" as its "principal product or service" on its United States Income Tax Return for an S-Corporation for each of the Years at Issue. *Id.*
31. Respondent listed "711210," Spectator Sports, as its "business code" on its United States Income Tax Return for an S-Corporation [for] each of the Years at Issue. *Id.*

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9. We have compared the trial court's findings to those contained in the Assistant Secretary's Final Decision because, as we have already noted, the Tax Review Board did not make findings of fact and because the trial court held that the Tax Review Board erred by concluding that the findings of fact contained in the Assistant Secretary's Final Decision lacked adequate evidentiary support.

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32. The business code on a United States Income Tax Return for an S-Corporation is based on NAICS and is determined by the activity from which a company “derives the largest percentage of its total receipts.” Administrative Record TRB-7, Exhibit No. 21, p. 29.
33. Respondent listed “NASCAR” as its “regular or principal trade or business in North Carolina” on its North Carolina S-Corporation Franchise and Income Tax Returns for each of the Years at Issue. Administrative Record TRB-7, Exhibit No. 1 through 3.

Nothing resembling these findings of fact appears in the Final Decision. As a result, the trial court’s findings of fact range far beyond the findings made by the Assistant Secretary and address new information that does not appear to have provided any part of the basis for the Assistant Secretary’s decision. Furthermore, given that the trial court made explicit reference to “Respondent’s representations on its United States Income Tax Returns for the Years at Issue” in determining that Respondent’s “ ‘principal product or service’ was ‘Auto Racing’ and its ‘principal business activity’ was ‘NASCAR Racing,’ ” it is clear that the additional findings of fact made by the trial court had a definite effect on the trial court’s decision.

One could argue, in reliance on N.C. Gen. Stat. § 150B-51(c), that the trial court properly engaged in independent fact-finding given the somewhat unusual procedural posture of this case. Any such argument would be in error.

According to N.C. Gen. Stat. § 150B-51(c):

In reviewing a final decision in a contested case in which an administrative law judge made a decision, in accordance with [N.C. Gen. Stat. §] 150B-34(a), and the agency does not adopt the administrative law judge’s decision, the court shall review the official record, *de novo*, and shall make findings of fact and conclusions of law. In reviewing the case, the court shall not give deference to any prior decision made in the case and shall not be bound by the findings of fact or the conclusions of law contained in the agency’s final decision. The court shall determine whether the petitioner is entitled to the relief sought in the petition, based upon its review of the official record. The court reviewing a final decision under this subsection may adopt the administrative law judge’s decision; may adopt, reverse, or mod-

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ify the agency's decision; may remand the case to the agency for further explanations under [N.C. Gen. Stat.] § 150B-36(b1), 150B-36(b2), or 150B-36(b3), or reverse or modify the final decision for the agency's failure to provide the explanations; and may take any other action allowed by law.

Any such logic cannot be squared with the relevant provisions of Chapter 150B of the General Statutes for a number of different reasons.

First, "administrative law judge" is a defined term in Chapter 150B of the General Statutes. According to N.C. Gen. Stat. § 150B-2(1), an "administrative law judge" "means a person appointed under [N.C. Gen. Stat. §] 7A-752, 7A-753, or 7A-757." All three of these statutory provisions refer to individuals employed by or acting under the authority of the Office of Administrative Hearings. Since the Office of Administrative Hearings was not involved in the administrative process which led to the present proceeding, N.C. Gen. Stat. § 150B-51(c) simply does not apply to this case.

Secondly, N.C. Gen. Stat. § 150B-51(c) is, by its own terms, only applicable to situations "in which an administrative law judge made a decision, in accordance with [N.C. Gen. Stat. §] 150B-34(a), and the agency does not adopt the administrative law judge's decision." N.C. Gen. Stat. § 150B-34(a) provides that:

Except as provided in [N.C. Gen. Stat. § 150B-36(c), and subsection (c) of this section, in each contested case the administrative law judge shall make a decision that contains findings of fact and conclusions of law and return the decision to the agency for a final decision in accordance with [N.C. Gen. Stat. §] 150B-36. The administrative law judge shall decide the case based upon the preponderance of the evidence, giving due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency. All references in this Chapter to the administrative law judge's decision shall include orders entered pursuant to [N.C. Gen. Stat. §] 150B-36(c).

*Id.* This statutory provision has no relevance to the present case. First, as has already been noted, the version of N.C. Gen. Stat. § 150B-1(e)(6) in effect at the time that this case was undergoing administrative review specifically exempted the Department from "[t]he contested case provisions of" Chapter 150B of the General

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Statutes. Secondly, the procedure contemplated by N.C. Gen. Stat. § 150B-34(a), under which a contested case is filed with the Office of Administrative Hearings; heard by an administrative law judge, who renders a decision subject to final agency review; and returned to the agency for a final decision, is simply not the process that was employed in this case. As a result, N.C. Gen. Stat. § 150B-51(c) does not apply in this situation for this reason as well.

Thus, for the reasons set forth above, nothing in Chapter 150B of the General Statutes absolved the trial court from the necessity for applying the usual standard of review applicable to appeals from administrative agencies in this case. As a result, “[a]ny determination that the trial court had the authority to disregard or supplement the administrative agency’s factual determinations would be inconsistent with the applicable standard of review and rest upon a misapplication of governing law.” *NC IDEA*, — N.C. App. at —, 675 S.E.2d at 98. By making additional findings of fact during the judicial review process, the trial court failed to adhere to this fundamental legal principle. Furthermore, given that the trial court’s additional factual findings had an impact on its decision to reverse the Tax Review Board’s Administrative Decision, the trial court’s error clearly had an effect on the outcome in the court below.

However, “[t]he trial court’s erroneous application of the standard of review does not automatically necessitate remand,” *Carroll*, 358 N.C. at 666, 599 S.E.2d at 898, so that further proceedings on remand may be avoided if the “court can reasonably determine from the record whether [Petitioner’s] asserted grounds for challenging the agency’s final decision warrant reversal or modification of that decision under the applicable provisions of N.C. [Gen. Stat.] § 150B-51(b).” *Id.* Thus, the next issue that we must address is the extent, if any, to which we are able to resolve the fundamental issue between the parties on appeal, or whether this matter must be remanded for further proceedings in the trial court or the relevant administrative agency.

Substantive Legal Issues

**[2]** The fundamental substantive dispute between the parties is the extent, if any, to which Respondent was actually entitled to receive Lee Act tax credits during the relevant tax years. In order to appropriately resolve this issue, we are compelled to examine both the eligibility provisions of the Lee Act and the definition of “manufacturing” contained in the relevant statutory language.

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At the time that it was initially enacted in 1998, N.C. Gen. Stat. § 105-129.2, which became effective for “taxable years beginning on or after” 1 January 1999, 1998 N.C. Sess. L. c. 55, s. 1, utilized the definition of “manufacturing” employed “in the North American Industry Classification System adopted by the United States Office of Management and Budget.” Effective 4 August 1999, the General Assembly enacted N.C. Gen. Stat. § 105-129.2(11), 1999 N.C. Sess. L. c. 360, s. 2, which defined “manufacturing” so as to include “[i]ndustries in manufacturing sectors 31 through 33, as defined by NAICS, but not including quick printing or retail bakeries.” The General Assembly revised the statutory definition of “manufacturing” effective 29 November 2001, 2001 N.C. Sess. L. c. 476, s. 1.(a), to provide that “[a] taxpayer is engaged in manufacturing if the taxpayer’s primary business is an industry in manufacturing sectors 31 through 33, as defined by NAICS, but not including quick printing or retail bakeries.” N.C. Gen. Stat. 105-129.2(16). Finally, “effective for taxable years beginning on or after” 1 January 2001, 2001 N.C. Sess. L. c. 476, s. 1.(b), the General Assembly rewrote N.C. Gen. Stat. § 105-129.2(16) to define “manufacturing” as “[a]n industry in manufacturing sectors 31 through 33, as defined by NAICS, but not including quick printing or retail bakeries.” Thus, throughout the entire period relevant for purposes of this case, the extent to which a particular business was engaged in “manufacturing” hinged on whether it properly belonged within NAICS Sectors 31 through 33.

A similar series of changes was made to the eligibility provisions for “manufacturers,” which have consistently been codified in N.C. Gen. Stat. § 105-129.4(a). Effective “for taxable years beginning on or after” 1 January 1999, 1998 N.C. Sess. L. c. 55, s.1, N.C. Gen. Stat. § 105-129.4(a)(4) made Lee Act credits available to taxpayers “engag[ing] in . . . [m]anufacturing.” The same basic language remained in effect until the enactment of 2001 N.C. Sess. L. c. 476, s. 6.(a), which rewrote the relevant eligibility provisions “effective for taxable years beginning on or after” 1 January 2001 to provide that “[a] taxpayer is eligible for the credits allowed by this Article . . . if the primary business of the taxpayer is . . . [m]anufacturing.” N.C. Gen. Stat. § 105-129.4(a)(3)a.

In light of these constantly changing statutory provisions, the parties agree that Respondent’s eligibility for Lee Act credits in the 2001 and 2002 tax years depends upon whether “manufacturing” was its “primary business.” However, Respondent contends that the “primary business” requirement does not apply to the 2000 tax year, rendering it eligible for Lee Act credits for that year as long as it merely

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“engaged” in manufacturing. We are not, however, persuaded by either Respondent’s logic or by the Department’s counterargument, which asserts that the insertion of “primary business” into the definition of “manufacturing” was intended to “clarify the intent of the existing law,” 2001 N.C. Sess. L. c. 471 s. 1.(c), and should be treated as retroactively applicable to the 2000 tax year for that reason.<sup>10</sup>

As the applicable statutory provisions existed for purposes of the 2000 tax year, Lee Act tax credits were available to taxpayers “engag[ing] . . . in manufacturing.” N.C. Gen. Stat. § 105-129.4(a)(4). According to the relevant definitional language, an entity was involved in “manufacturing” during the 2000 tax year in the event that it was engaged in “manufacturing sectors 31 through 33, as defined by NAICS . . .” N.C. Gen. Stat. § 105-129.2(11). The fact that the definition of “manufacturing” in effect for purposes of the 2000 tax year hinges upon the NAICS guidelines and the fact that the NAICS guidelines provide that “[a]n establishment is classified to an industry when its primary activity meets the definition for that industry” necessitate a conclusion that “manufacturing” had to be the taxpayer’s “primary activity” in order for that taxpayer to be eligible to receive Lee Act credits as a “manufacturer” for the 2000 tax year. As a result, the mere fact that Respondent engaged in “manufacturing” during 2000, without more, did not render it eligible to receive Lee Act credits for that tax year, making eligibility for Lee Act tax credits dependent upon whether “manufacturing” was the taxpayer’s “primary activity” or “primary business” in each of the years in question.<sup>11</sup>

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10. The language of 2001 N.C. Sess. L. c. 476, s. 1.(a), standing alone, would appear to work a change in law rather than a mere clarification of it. Given the well-established rule that statutes generally have only prospective effect, *State v. Green*, 350 N.C. 400, 404, 514 S.E.2d 724, 727 (1999), and the absence of any indication that the General Assembly intended to retroactively change existing law by enacting 2001 N.C. Sess. L. c. 476, s. 1.(a), we do not believe that this provision, standing alone, suffices to create a “primary business” requirement of the type contended for by the Department. However, for the reasons set forth in the text, we believe that other aspects of the relevant statutory language produce the result contended for by the Department.

11. The trial court and the Department place significant emphasis upon the fact that legislation, now codified in N.C. Gen. Stat. § 105-129.83, allowing racing teams to claim Lee Act tax credits regardless of the primary business in which such entities are engaged was enacted in 2006. Although the Department contends with considerable vigor, and the trial court agreed, that the enactment of this legislation demonstrates that Respondent was not eligible for Lee Act tax credits in prior years, the validity of this argument depends upon acceptance of the Department’s position that Respondent was primarily engaged in NASCAR racing rather than manufacturing during the relevant tax years. Since this aspect of the Department’s argument assumes the point at issue, the trial court erred to the extent that it placed any reliance on the enactment of N.C. Gen. Stat. § 105-129.83.

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As a result, in order to resolve the ultimate issue in dispute between the parties, the Court must determine the test to be utilized in identifying Respondent's "primary business" or "primary activity," terms which we believe to be synonymous. On the one hand, the Department, with the support of the trial court, contends that a taxpayer's "primary business" or "primary activity" is best measured based upon the value of the revenues that the entity derives from that activity. On the other hand, Respondent, with the apparent support of the Tax Review Board, contends that a taxpayer's "primary business" or "primary activity" is best measured based on the percentage of the taxpayer's production costs and capital investment devoted to manufacturing-related activities. In order to resolve this dispute, we are required to analyze the relevant statutory language, making the ultimate issue before us one of statutory construction.

"The principal goal of statutory construction is to accomplish the legislative intent." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (citing *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297, 507 S.E.2d 284, 290 (1998) *cert. denied*, 526 U.S. 1098, 143 L. Ed. 2d 671 (1999)). "The best indicia of that intent are the language of the statute . . . , the spirit of the act and what the act seeks to accomplish." *Coastal Ready-Mix Concrete Co., Inc. v. Board of Commr's*, 299 N.C. 620, 629, 265 S.E.2d 379, 385, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 106 (1980). "If a taxing statute is susceptible to two constructions, any uncertainty in the statute or legislative intent should be resolved in favor of the taxpayer." *Lenox*, 353 N.C. at 664, 548 S.E.2d at 517 (citing *Polaroid*, 349 N.C. at 297, 507 S.E.2d at 290).

As we have already noted, the relevant statutory provisions rely upon the NAICS guidelines in defining those manufacturers eligible for Lee Act tax credits. "Legislative purpose is first ascertained from the plain words of the statute." *Electric Supply Co. of Durham, Inc. v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991). For that reason, it is logical to assume that the General Assembly intended that the NAICS system would inform efforts to identify entities eligible to receive Lee Act tax credits as well. In recognition of the fact that many business entities are engaged in multiple activities, the NAICS guidelines provide that:

An establishment is classified to an industry when its primary activity meets the definition for that industry. Because establishments may perform more than one activity, it is necessary to determine procedures for identifying the primary activity of the establishment.

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In most cases, if an establishment is engaged in more than one activity, the industry code is assigned based on the establishment's principal product or group of products produced or distributed, or services rendered. Ideally, the principal product or service should be determined by its relative share of current production costs and capital investment at the establishment. In practice, however, it is often necessary to use other variables such as revenue, shipments, or employment as proxies for measuring significance.

Although the quoted language is not completely free from ambiguity, it does express a preference for determining an entity's primary business activity on the basis of "the relative share of current production costs and capital investment." However, the fact that the use of "current production costs and capital investment" is "ideal" does not, according to the literal language of the NAICS guidelines, mean that this measurement can be appropriately used in all instances. Instead, the NAICS guidelines explicitly recognize that there are circumstances under which another approach might be preferable, although the guidelines do not provide much assistance in identifying the circumstances under which deviations from the "ideal" are appropriate.

The Department adopted its own guidelines in order to assist taxpayers in determining their own eligibility for Lee Act tax credits. "The interpretation of a statute given by the agency charged with carrying it out is entitled to great weight." *Frye Regional Medical Center v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163, *reh'g denied*, 350 N.C. 314, 534 S.E.2d (1999) (citing *High Rock Lake Ass'n, Inc. v. N.C. Envt'l. Mgmt. Comm'n.*, 51 N.C. App. 275, 279, 276 S.E.2d 472, 475 (1981)). In apparent recognition of the appropriateness of relying on the NAICS guidelines in applying the relevant statutory provisions, the Department's guidelines are similar, but not identical, to those provided by NAICS. According to the Department's guidelines for 2001:<sup>12</sup>

For most of the eligible business types, the law specifies that the taxpayer's primary business must be a designated business. To claim a credit as a taxpayer that provides air courier services or data processing services, for example, the provision of these services must be the primary business of the taxpayer and not just the taxpayer's primary activity at one establishment. Similarly, to claim a credit as a customer service center, the

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12. Identical language appears in the Department's guidelines for 2002.

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taxpayer's primary business must be telecommunications or financial services.

The determination of whether an activity of a company is its primary business is based on the principal product or group of products the taxpayer produces or distributes or the principal services the taxpayer provides. The relative share of production costs and capital investment reflects the principal product or service. The activities at all the taxpayer's establishments are considered in determining the taxpayer's primary business.

As is the case with the NAICS guidelines, there is a clear focus in the Department's guidelines on the "relative share of production costs and capital investment." In addition, like the NAICS guidelines, the Department's guidelines do not make "relative share of production costs and capital investment" conclusive evidence of the taxpayer's "primary business" or "primary activity." The key word in the Department's guidelines is "reflects," which, as used here, means "to make manifest or apparent." *Merriam-Webster's Collegiate Dictionary* 1046 (11th ed. 2005). *Perkins v. Arkansas Trucking Services, Inc.*, 351 N.C. 634, 638, 528 S.E.2d 902, 904 (2000) (stating that, "[n]othing else appearing, the Legislature is presumed to have used the words of a statute to convey their natural and ordinary meaning" and that, "[i]n the absence of a contextual definition, courts may look to dictionaries to determine the ordinary meaning of words within a statute") (quoting *In re McLean Trucking Co.*, 281 N.C. 242, 252, 188 S.E.2d 452, 458 (1972)) (citing *Black v. Littlejohn*, 312 N.C. 626, 638, 325 S.E.2d 469, 478 (1985); *State v. Martin*, 7 N.C. App. 532, 533, 173 S.E.2d 47, 48 (1970)). The fact that certain criteria "manifest" or "make apparent" a disputed fact does not mean that they conclusively establish it; instead, it simply means that they strongly suggest that the disputed fact exists. As a result, by using the term "reflects," the Department indicated that this set of criteria was of considerable importance and should be used in making the required eligibility determination in the absence of a substantial reason to refrain from doing so.<sup>13</sup>

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13. As an aside, we note that N.C. Gen. Stat. § 105-264 provides that, "[w]hen the Secretary interprets a law by adopting a rule or publishing a bulletin or directive on the law, the interpretation is a protection to the officers and taxpayers affected by the interpretation, and taxpayers are entitled to rely upon the interpretation." Although Respondent does not appear to have cited this statutory provision in addressing the assessment and penalty issues that have been raised in this case and although we express no opinion as to the manner in which those issues should be resolved given our belief that this case should be remanded for new findings and conclusions, we

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As a result, both the NAICS and Department guidelines clearly indicate that the relevant statutory provisions require that serious consideration be given to the “relative share of current production costs and capital investment.” However, the same guidelines indicate that those criteria should not be deemed conclusive evidence of an entity’s “primary business” or “primary activity.” As a result, we believe that the proper construction of the relevant statutory provision requires the use of a three step analysis for identifying the “primary business” or “primary activity” in which a particular entity is engaged. First, as applied to this case, the relative percentage of production costs and capital investment utilized in Respondent’s manufacturing business compared to the same figures for its overall business should be determined. Secondly, an analysis of the extent to which Respondent’s production costs and capital investment are manufacturing-related provides a proper basis for identifying Respondent’s “primary business” or “primary activity” should be undertaken. Thirdly, in the event that the analyst concludes that the relative percentage of production costs and capital investment does not, given the particular facts of this case, provide an adequate basis for properly identifying Respondent’s “primary business” or “primary activity,” the analyst should examine all other relevant factors, determine which factors should be employed and the reasons that those factors should be utilized, and, based on the totality of the relevant circumstances, identify Respondent’s “principal product or group of products.” At all stages of this process, we believe that it will be necessary for the analyst to make detailed findings of fact and conclusions of law in order to ensure that a reviewing court will be able to determine the factual basis for and reasoning process that underlies the analyst’s decision. Although this analysis will necessarily be very case- and fact-intensive, we do not believe that any other approach properly takes into consideration all of the factors apparently contemplated by the relevant statutory provisions.<sup>14</sup>

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believe that N.C. Gen. Stat. § 105-264 might be pertinent to the issue of any liability that Respondent might have for assessments or penalties, depending on the outcome of this case on remand.

14. The parties engage in a vigorous debate over the relevance of Respondent’s descriptions of its business on various federal and state tax returns. On the one hand, the Department contends that these descriptions are highly important admissions against interest by Respondent. On the other hand, Respondent argues that these statements are of no importance, since the criteria to be used in describing one’s business on federal and state tax returns differ from the criteria to be used in determining one’s eligibility for Lee Act tax credits. Although the trial court erred by relying on these descriptions in reaching its conclusion as to the nature of Respondent’s business, since

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When measured by this standard, it is clear that the trial court's order and the Assistant's Secretary's Final Decision are both deficient.<sup>15</sup> A careful examination of both the Assistant Secretary's Final Decision and the trial court's order establishes that neither considered the percentage of production costs or capital investment that the Respondent devoted to manufacturing in the 2000, 2001, and 2002 tax years in attempting to identify Respondent's "primary business" or "primary activity." Neither order contains findings of fact relating to those factors, despite the presence of record evidence relating to those issues. Instead, both the Assistant Secretary and the trial court treated the fact that the majority of Respondent's revenues were derived from winnings, sponsorships, and royalties associated with NASCAR racing and (at least in the case of the trial court) the fact that Respondent represented itself as primarily engaged in businesses related to NASCAR racing on its federal tax returns as conclusive on the "primary business" or "primary activity" issue without any explanation for their failure to address the evidence relating to the relative percentage of Respondent's production costs and capital investment devoted to manufacturing. As a result of the fact that evidence addressing the percentage of production costs and capital investment that Respondent devoted to manufacturing appeared in the record and was relevant to the "primary business" or "primary activity" issue, the Assistant Secretary and the trial court were required to take that information into account in deciding the case, so that the trial court erred by disregarding this issue without comment. The fact that neither the Assistant Secretary nor the trial court made any mention of this evidence establishes that the substantive legal standard that they employed in identifying Respondent's "primary business" or "primary activity" as NASCAR racing rather than manufacturing constituted error of law.

Thus, we conclude that the trial court and the Assistant Secretary erred by failing to consider Respondent's relative percentage of

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there were no findings of fact made at the administrative level concerning this issue, we do not believe that we need to resolve any issues regarding the relevance of the descriptions of Respondent's business in these tax returns given the nature of the remand that we believe to be appropriate. In the event that the Department contends that the descriptions of Respondent's business in these returns ought to be considered on remand, it should seek to have findings made concerning what options were available to Respondent and the descriptions that Respondent actually utilized.

15. The Tax Review Board's failure to make findings and conclusions or to otherwise state the basis for its decision makes it difficult for us to comment on the merits of its decision.

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production costs and capital investment devoted to manufacturing in identifying Respondent's "primary business" or "primary activity." On the other hand, for the reasons set forth above, we can likewise not accept the Respondent's argument that the record evidence conclusively establishes that "manufacturing" was its "primary business" or "primary activity" during the relevant time period and that this Court should order the Department to award the disputed tax credits. We reach this conclusion for several reasons. First, although the record contains evidence tending to show the relative percentage of Respondent's production costs and capital investment devoted to manufacturing compared to Respondent's overall production costs and capital investment, those figures are not embodied in any finding of fact. We do not believe that we are entitled to engage in appellate fact-finding of the type that is inherently required by Respondent's argument. Secondly, it appears to us that the Respondent's argument treats the relative production cost and capital investment figures revealed by the record as conclusive of, rather than merely highly relevant to, Respondent's eligibility for Lee Act tax credits. For the reasons stated above, we do not believe that this evidence necessarily has such conclusive effect. Finally, given that additional fact-finding appears to be necessary in order for a proper decision to be rendered, we believe that it is unfair to both the Department and Respondent to deprive them of the opportunity to be heard with respect to all relevant factual issues before a final decision is made. Thus, we conclude that neither party is entitled to prevail on the merits on appeal as a matter of law and that further administrative proceedings are necessary in order to ensure that Respondent's eligibility for the disputed tax credits is properly decided.

As a result, having determined that, in addition to applying an incorrect standard of review, the trial court also applied an incorrect substantive legal standard, that we are unable to resolve the substantive dispute between the parties on appeal, and that additional fact-finding appears to be necessary, we have no choice except to reverse the trial court's order and require further proceedings on remand. For that reason, we reverse the trial court's order and remand this case to the trial court for further remand to the Office of Administrative Hearings for a new hearing to be conducted under the procedures for administrative review of tax disputes which are now in effect. At this new hearing, appropriate factual findings should be made and an new administrative decision rendered in light of the applicable legal standard, which will then be submitted to the Department for a final

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agency decision subject to judicial review in accordance with Chapter 150B of the General Statutes.<sup>16</sup>

Reversed and remanded.

Judges ELMORE and STROUD concur.

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NICOLE HENSEY, PLAINTIFF v. MARK HENNESSY, DEFENDANT

No. COA08-1277

(Filed 17 November 2009)

**1. Appeal and Error— interlocutory orders—*ex parte* domestic violence protective order**

An *ex parte* domestic violence protective order (DVPO) was heard on appeal even though it was interlocutory where defendant waited until after a DVPO was entered to file notice of appeal to both the *ex parte* DVPO and the DVPO.

**2. Domestic Violence— protective order—*ex parte* hearing—evidence**

It was presumed that the facts as found in an *ex parte* domestic violence protective order were supported by competent evidence where the record reflected that a hearing was held and plaintiff appeared, presumably offering evidence.

**3. Domestic Violence— *ex parte* protective order—findings—incorporation of complaint**

*Ex parte* domestic violence protective orders need not contain findings and conclusions that fully satisfy the requirements of N.C.G.S. § 1A-1, Rule 52, but it was still necessary to consider whether the order in this case was sufficient since the court simply incorporated the allegations of the complaint. While it would be preferable for the court to set forth specific facts, this order, read with the complaint, provides sufficient information for appellate review.

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16. In view of the fact that this case should be remanded for a new administrative hearing, there is no need for us to address the matters at issue between the parties concerning the penalties that the Department has attempted to assess against Respondent.

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**4. Domestic Violence— *ex parte* order—findings and conclusions—sufficiently supported**

The findings and conclusions in an *ex parte* domestic violence protective order were supported by the allegations of the verified complaint and the recency and severity of defendant's acts.

**5. Domestic Violence— basis of protective order—memory of separate proceeding—sufficiency**

There was no competent evidence to support the issuing of a domestic violence protective order where the trial court relied on its memory of a separate proceeding. Furthermore, judicial notice was not appropriate for factual issues such as those presented here.

Appeal by defendant from orders entered 19 November 2007 by Judge Leonard W. Thagard, and 10 March 2008 and 21 April 2008 by Judge Henry L. Stephens, IV, in Onslow County District Court. Heard in the Court of Appeals 6 May 2009.

*Lana S. Warlick, for plaintiff-appellee.*

*Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene and Tobias S. Hampson, for defendant-appellant.*

STROUD, Judge.

Defendant appeals from a 19 November 2007 *ex parte* domestic violence order of protection, 10 March 2008 domestic violence order of protection, and 21 April 2008 order denying defendant's motions for a new trial and relief from judgment. For the following reasons, we affirm the 19 November 2007 *ex parte* domestic violence order of protection and reverse the 10 March 2008 domestic violence order of protection.

**I. Background**

On 19 November 2007, plaintiff filed a "complaint and motion for domestic violence protective order[.]" (original in all caps), alleging that on 17 November 2007, while she was 29 weeks pregnant, defendant had, *inter alia*, "put [her] in a headlock" and "banged [her] into a wall[.]" On 19 November 2007, the trial court granted an "ex parte domestic violence order of protection ("ex parte DVPO"), (original in all caps), to be "effective until November 26, 2007[.]" The trial court also noticed a hearing for 26 November 2007.

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Defendant moved for a continuance, and the hearing was rescheduled for 10 December 2007. The ex parte DVPO was “continued in effect until the date of the hearing[.]” On 10 December 2007, defendant filed a motion for another continuance. The hearing was rescheduled for 14 January 2007, and the trial court again ordered that the ex parte DVPO remain in effect. On or about 17 December 2007, Joseph E. Stroud, Jr. entered his appearance on behalf of defendant. On 14 January 2008, the hearing was again continued by agreement of the parties until 10 March 2008; once again the ex parte DVPO remained in effect.

At the hearing on 10 March 2008, neither defendant nor his attorney were present. The trial court entered a “domestic violence order of protection” (“DVPO”) (original in all caps), to be in effect until 10 March 2009. On 11 March 2008, defendant’s attorney filed motions (1) for a new trial, (2) or, in the alternative, to set aside the 10 March 2008 DVPO, (3) to withdraw as counsel, and (4) to expedite the hearing of the motions. On 10 April 2008, defendant’s attorney filed a separate motion to withdraw as counsel. On 21 April 2008, the trial court denied defendant’s motions for a new trial and for relief from judgment. On 22 April 2008, the trial court allowed defendant’s attorney to withdraw as counsel. Defendant appeals the ex parte DVPO, the DVPO, and the order denying his motions for a new trial and for relief from judgment.

**II. Appeal of Interlocutory Order**

[1] Though not addressed by either party, “whether an appeal is interlocutory presents a jurisdictional issue, and this Court has an obligation to address the issue *sua sponte*.” *Duval v. OM Hospitality, LLC*, 186 N.C. App. 390, 392, 651 S.E.2d 261, 263 (2007) (citation, quotation marks, and brackets omitted). In *Smart v. Smart*, the defendant appealed from either an emergency or ex parte DVPO entered pursuant to N.C. Gen. Stat. § 50B-2. 59 N.C. App. 533, 536, 297 S.E.2d 135, 137 (1982). This Court dismissed the appeal and held “that the order is interlocutory and the immediate temporary emergency relief granted by the order does not affect any substantial right of the defendant which cannot be protected by timely appeal from the trial court’s ultimate disposition of the entire controversy on the merits.” *Id.* at 536, 297 S.E.2d at 137-38. *Smart* is distinguishable from the present case because in *Smart* the defendant failed to appeal from the final order; in fact, in *Smart* it is unclear whether the trial court ever entered a final order. *See Smart*, 59 N.C. App. 533, 297 S.E.2d 135.

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We have been unable to find any precedential case law which has addressed an appeal from an ex parte DVPO where the notice of appeal was filed after entry of the DVPO *and* notice of appeal was given as to both the ex parte DVPO and the DVPO. Thus, we conclude that although the ex parte DVPO was an interlocutory order and would not have been immediately appealable, *see Smart* at 536, 297 S.E.2d at 137-38, it is now “reviewable . . . [only] on appropriate exception upon an appeal from the final judgment in the cause.” *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d, 377, 382 (1950) (citation omitted); *see Love v. Moore*, 305 N.C. 575, 578, 291 S.E.2d 141, 144 (1982) (“An interlocutory decree which does not affect a substantial right is reviewable only on appropriate exception upon an appeal from the final judgment in the cause.” (citation omitted)). As defendant properly waited until after entry of the DVPO to file his notice of appeal to the ex parte DVPO and the DVPO together, we will review both orders.

**III. Standard of Review**

When the trial court sits without a jury [regarding a DVPO], the standard of review on appeal is whether there was competent evidence to support the trial court’s findings of fact and whether its conclusions of law were proper in light of such facts. Where there is competent evidence to support the trial court’s findings of fact, those findings are binding on appeal.

*Burress v. Burress*, — N.C. App. —, —, 672 S.E.2d 732, 734 (2009) (citations, quotation marks, and brackets omitted).

**IV. Ex Parte DVPO**

Defendant first contends that the trial court erred by making insufficient findings of fact before issuing the ex parte DVPO. Essentially, the defendant raises three separate arguments as to the ex parte order: (1) the trial court did not hear any evidence, but instead based the ex parte DVPO only upon the verified complaint; (2) the DVPO did not contain any findings as to the “specific facts” upon which it is was based; and (3) if the ex parte DVPO did contain findings of fact, they were not sufficient under N.C. Gen. Stat. § 1A-1, Rule 52.

**1. DVPO Hearing**

**[2]** A court may only issue an ex parte DVPO if “it clearly appears to the court from *specific facts shown*, that there is a danger of acts of domestic violence against the aggrieved party[.]” N.C. Gen. Stat.

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§ 50B-2(c) (emphasis added). N.C. Gen. Stat. § 50B-2(c) does not provide that the trial court may issue an ex parte DVPO based solely upon the allegations of the complaint. N.C. Gen. Stat. § 50B-2(c) instead provides that

[i]f an aggrieved party acting pro se requests ex parte relief, the clerk of superior court shall schedule an *ex parte hearing* with the district court division of the General Court of Justice within 72 hours of the filing for said relief, or by the end of the next day on which the district court is in session in the county in which the action was filed, whichever shall first occur.

*Id.* (emphasis added).<sup>1</sup>

Therefore, N.C. Gen. Stat. § 50B-2 requires that a “hearing” be held prior to issuance of the ex parte DVPO. *See id.* If the ex parte DVPO could be issued based only upon the verified complaint, without having the aggrieved party appear for a hearing before a judge or magistrate, there would be no need to schedule a hearing; the judge or magistrate could simply read the verified complaint and decide whether to issue the ex parte DVPO. *See id.*

The record before us does not contain any transcript of the ex parte hearing held on 19 November 2007, but the ex parte DVPO provides that “[t]his matter was heard” by the trial judge on that date. Given the expedited nature of the ex parte hearing process, we recognize the possibility that no transcript of that hearing was available to the parties. However, the record reflects that an ex parte hearing was held, and plaintiff appeared *pro se* before the trial court to request the ex parte DVPO, so presumably she offered evidence. *See Potts v. Potts*, 19 N.C. App. 193, 194, 198 S.E.2d 203, 204 (1973) (“Where there is evidence offered before the trial court and appellant assigns as error that the evidence does not support the findings of fact by the trial judge, but does not include the evidence in the record on appeal, we will presume the facts found are supported by competent evidence.”). We may therefore presume that the facts as found in the ex parte DVPO were supported by competent evidence. *See id.*

## 2. Incorporation of Complaint into Ex Parte DVPO

**[3]** Defendant’s next arguments deal with the trial court’s actual findings of fact. N.C. Gen. Stat. § 50B-2(c) provides that the trial court

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1. N.C. Gen. Stat. § 50B-2(c1) contains similar hearing provisions for the issuance of ex parte DVPO by magistrates in districts where the chief district judge has authorized magistrates to hear these cases. *See* N.C. Gen. Stat. § 50B-2(c1).

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may enter an ex parte DVPO to protect the plaintiff “if it clearly appears to the court from specific facts shown, that there is a danger of acts of domestic violence against the aggrieved party[.]” N.C. Gen. Stat. § 50B-2(c). Ex parte DVPOs pursuant to N.C. Gen. Stat. § 50B-2 are normally in effect for a very brief time, until either entry or denial of entry of a DVPO under N.C. Gen. Stat. § 50B-3, as DVPO hearings are required “within 10 days from the date of issuance of the [ex parte DVPO] or within seven days from the date of service of process on the other party, whichever occurs later.” *Id.* Most likely due to the brief life of ex parte DVPOs, we find no prior cases which have addressed the findings of fact required in an ex parte DVPO.

An ex parte DVPO, although brief in duration, can have a tremendous effect upon a defendant. An ex parte DVPO requiring a defendant not to “assault, threaten, abuse, follow, harass . . . , or interfere with the plaintiff” should not impose any particular hardship upon the defendant; however, the ex parte DVPO may also require a defendant to, *inter alia*, leave his or her home, stay away from his or her children, give up possession of a motor vehicle, and surrender his or her “firearms, ammunition, and gun permits” to the sheriff. In addition, a defendant who knowingly violates a valid protective order, including an ex parte DVPO, may be charged with a class A1 misdemeanor or with various felonies for certain violations. See N.C. Gen. Stat. § 50B-4.1.<sup>2</sup> Due to the potentially serious consequences of the ex parte DVPO, N.C. Gen. Stat. § 50B-2(c) requires that the ex parte DVPO be issued only if it “clearly appears” based upon “specific facts shown, that there is a danger of acts of domestic violence against the aggrieved party[.]” N.C. Gen. Stat. § 50B-2(c). Thus, in order to issue an ex parte DVPO, the trial court must make findings of fact which include “specific facts” which demonstrate “that there is a danger of acts of domestic violence against the aggrieved party[.]” *Id.*

Defendant argues that the ex parte DVPO failed to include findings of fact at all, as the entire notation by the trial court was “see complaint[.]” However, the complete factual findings of the ex parte DVPO, including provisions from the preprinted form, were as follows:

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2. In Session Law 2009-342, the legislature recently clarified that a “valid protective order” under N.C. Gen. Stat. § 50B-4.1 includes emergency and ex parte orders entered under N.C. Gen. Stat. Chapter 50B. See 2009-3 N.C. Adv. Legis. Serv. 142 (LexisNexis).

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2. That on (date of most recent conduct) *see complaint*, the defendant
  - a. attempted to cause . . . bodily injury to the plaintiff . . .
  - b. placed in fear of imminent serious bodily injury the plaintiff[.]

[The trial court then made the following conclusions of law:]

1. The defendant has committed acts of domestic violence against the plaintiff.

. . . .

3. It clearly appears that there is a danger of acts of domestic violence against the plaintiff.<sup>3</sup>

(Emphasis added.) Thus, it appears that the trial court incorporated the allegations of the complaint into its *ex parte* DVPO for the “specific facts” showing “that there is a danger of acts of domestic violence against the aggrieved party[.]” N.C. Gen. Stat. § 50B-2(c).

Defendant argues that pursuant to N.C. Gen. Stat. § 1A-1, Rule 52, the trial court is required to “find the facts specially and state separately its conclusions of law thereon and direct entry of the appropriate judgment.” N.C. Gen. Stat. § 1A-1, Rule 52(a) (2007). Defendant argues that the requirements of N.C. Gen. Stat. § 1A-1, Rule 52 apply to DVPO actions under N.C. Gen. Stat. Chapter 50B, as this is an “action[] tried upon the facts without a jury[.]” *Id.*

We must first consider the extent of the application of N.C. Gen. Stat. Chapter 1A, the Rules of Civil Procedure, to actions brought under Chapter 50B. N.C. Gen. Stat. § 1A-1, Rule 1 provides that “[t]hese rules shall govern the procedure in the superior and district courts of the State of North Carolina in all actions and proceedings of a civil nature except when a differing procedure is prescribed by statute.” N.C. Gen. Stat. § 1A-1, Rule 1. An action under Chapter 50B is a civil action. *See* N.C. Gen. Stat. § 50B-2 (2007) (“Any person residing in this State may seek relief under this Chapter by filing a *civil action* . . . .”) Therefore, the Rules of Civil Procedure apply to actions under Chapter 50B, except to the extent that “a differing procedure is prescribed by statute.” N.C. Gen. Stat. § 1A-1, Rule 1.

N.C. Gen. Stat. § 50B-2 sets forth certain specialized procedures which apply to actions which allege acts of domestic violence against

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3. Only the words in italics were added by the trial court.

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an aggrieved party or a child residing with or in the custody of an aggrieved party under Chapter 50B. N.C. Gen. Stat. § 50B-2(a). The specialized procedures deal with issuance of emergency relief and ex parte DVPOs. N.C. Gen. Stat. § 50B-2(b) and (c). Although the procedures for emergency and ex parte DVPOs bear some resemblance to the procedures for temporary restraining orders under N.C. Gen. Stat. § 1A-1, Rule 65(b), *compare* N.C. Gen. Stat. §§ 1A-1, Rule 65(b); 50B-2, proceedings under Chapter 50B are distinct from proceedings under N.C. Gen. Stat. § 1A-1, Rule 65. *See State v. Byrd*, 363 N.C. 214, 221, 675 S.E.2d 323, 326 (2009) (“The order entered by the trial court was, therefore, an *ex parte* TRO entered under Rule 65(b), not a valid domestic violence protective order, entered pursuant to Chapter 50B.”). The procedures under N.C. Gen. Stat. § 50B-2 are intended to provide a method for trial court judges or magistrates to quickly provide protection from the risk of acts of domestic violence by means of a process which is readily accessible to *pro se* complainants. *See* N.C. Gen. Stat. § 50B-2. However, Chapter 50B does not contain any provisions which specifically exclude or conflict with any of the Rules of Civil Procedure which may be relevant to this case.

However, requiring findings and conclusions of the nature contemplated by N.C. Gen. Stat. § 1A-1, Rule 52 would be inconsistent with the fundamental nature and purpose of an ex parte DVPO, which is intended to be entered on relatively short notice in order to address a situation in which quick action is needed in order to avert a threat of imminent harm. In such circumstances, there is simply not sufficient time to enter an order that is fully compliant with the requirements of N.C. Gen. Stat. § 1A-1, Rule 52. For that reason, despite the absence of specific statutory language excluding ex parte DVPOs from the coverage of the findings and conclusions requirement of N.C. Gen. Stat. § 1A-1, Rule 52, we hold that such orders need not contain findings and conclusions that fully satisfy the requirements of that provision of the Rules of Civil Procedure. Having reached this conclusion, however, we still need to address the adequacy of the ex parte DVPO entered in the present case, in which the trial court simply incorporated the allegations of the complaint into its order rather than setting forth a separate statement of its factual findings.

Although it appears that this Court has never specifically approved incorporation of language from a complaint into a DVPO, we have recognized that a trial court may incorporate such allegations in other types of cases; for example, in *State v. Henderson*, 179 N.C. App. 191, 632 S.E.2d 818 (2006), a probation violation case,

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the trial court used a “form for Judgment and Commitment Upon Revocation of Probation, AOC-CR-608.” *Id.* at 196-97, 632 S.E.2d at 822. Mostly by use of the “preprinted text” of the form, the order provided in part that

defendant was charged with violation of probation conditions as alleged in the violation reports, which were incorporated by reference, (3) the trial court was reasonably satisfied, by the evidence presented, that defendant violated each of the conditions set forth in the violation reports dated 5 April 2005, and (4) each violation was sufficient to revoke defendant’s second probation and activate his suspended sentence.

*Id.* at 197, 632 S.E.2d at 822. The defendant argued that “the trial court’s findings were not sufficiently specific to enable an appellate court to review the trial court’s decision[.]” but this Court rejected the defendant’s argument and concluded that “the completed form, together with the probation violation report which was incorporated by reference, contained sufficient findings of fact to support revocation of defendant’s second probation.” *Id.* We see no reason why a similar approach should not suffice here, particularly given the need for expedition in the handling of results for the issuance of ex parte DVPOs. Thus, we conclude that while it would be preferable for the trial court to set forth the “specific facts” which support its order separately, instead of by reference to the complaint, the ex parte DVPO, read in conjunction with plaintiff’s complaint, does provide sufficient information upon which we may review the trial court’s decision to issue the ex parte DVPO. *See generally id.*

### 3. Sufficiency of Findings of Fact

**[4]** The “specific facts” here, as incorporated into the DVPO from the allegations of the verified complaint, are that on the

[n]ight of Saturday Nov. 17 2007 (police report & magistrate papers documented) [Plaintiff] was at [defendant]’s house and [they] had a disagreement over a girlfriend of his he currently contact[ed]. [Plaintiff] told [defendant] [she] wanted to go home & proceeded to call [her] parents to come & pick [her] up. [She] then gathered all of [her] belongings and realized [she] did not have [her] cell phone. [She] used his house phone to call [her] (sic) to find it’s (sic) location. [She] found it broken in ½ & hidden from [her] ([defendant] did it) [Defendant] then started to heckle [her] (close to [her] face) calling [her] name[s.] Next [she]

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was put in a headlock and dragged. [She] was crying & kicking, & screaming to let [her] go/your (sic) hurting me'. [Defendant] banged [her] into a wall several times. [She] put [her] foot/leg up to prote[ct] [her] pregnant belly. [She] finally got loose—ran around [defendant's] house (running away from him) and ran outside. [Defendant] chased [her] yelling at [her]. [She] went to a neighbor for help b/c [her] cell could not call 911.

Furthermore, plaintiff's complaint stated that "[t]here is another court proceeding between the defendant and [plaintiff] pending" for domestic violence and that plaintiff "believe[d] there is danger of serious and immediate injury to [her] or [her] child(ren)." By reference to the allegations of plaintiff's complaint, the trial court has complied with N.C. Gen. Stat. § 1A-1, Rule 52 and N.C. Gen. Stat. § 50B-2(c) regarding the findings of fact as to the "specific facts show[ing] that there is a danger of acts of domestic violence against the aggrieved party[.]" N.C. Gen. Stat. § 50B-2(c).

Lastly, as to the ex parte DVPO, we must consider "whether [the trial court's] conclusions of law were proper in light of [the] facts." *Id.* "[I]f it *clearly appears to the court from specific facts shown, that there is a danger of acts of domestic violence against the aggrieved party* or a minor child, the court may enter orders *as it deems necessary to protect the aggrieved party[.]*" N.C. Gen. Stat. § 50B-2(c) (emphasis added). Thus, in order for a trial court to properly enter an ex parte DVPO it must "clearly appear to the court from specific facts shown, that" . . . "the aggrieved party" is in "danger of acts of domestic violence[.]" *Id.* As the purpose of entering an ex parte DVPO is "to protect the aggrieved party[.]" *id.*, "the decision of the trial court must of necessity be predictive in nature, as the trial court must assess whether there is a substantial risk of future" harm. *See generally In re A.S.*, 190 N.C. App. 679, 690, 661 S.E.2d 313, 320 (2008) (citation and quotation marks omitted).

Here, the findings of fact show that on the Saturday prior to the Monday on which plaintiff filed her complaint, defendant had broken and hidden plaintiff's cell phone and heckled her. Defendant then put plaintiff in a headlock, dragged her, and banged her into a wall. When plaintiff got away from defendant, he chased her until she reached a neighbor's home to call for help. In addition, plaintiff and defendant had been in a dating relationship; plaintiff was 29 weeks pregnant with defendant's child; plaintiff and defendant had other pending domestic violence proceedings; and plaintiff believed she was in serious, immediate danger. Considering the recency and severity of de-

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defendant's acts, we conclude that the trial court did not err in its conclusion that plaintiff was in "danger of acts of domestic violence" and in need of protection. *See* N.C. Gen. Stat. § 50B-2(c).

## IV. DVPO

[5] Defendant next argues that "the trial court erred by entering the domestic violence order of protection without any evidence to support the findings of fact or conclusions of law and where defendant was denied any opportunity to be heard[.]" Defendant first contends that

to the extent the trial court entered the 10 March 2008 order based on the ex parte order, if this Court reverses the ex parte order, the trial court's basis for entering the 10 March 2008 order would be void, and the 10 March 2008 order should also be reversed.

Although we have not reversed the ex parte DVPO, defendant is incorrect in his argument that the DVPO is dependent upon a valid ex parte DVPO. The two orders are independent of one another, and in some situations, a DVPO pursuant to N.C. Gen. Stat. § 50B-3 is entered properly even though an ex parte order may have been denied or was never requested. In fact, Chapter 50B provides for three separate types of orders: (1) an emergency order pursuant to N.C. Gen. Stat. § 50B-2(b)<sup>4</sup>, (2) an ex parte order pursuant to N.C. Gen. Stat. § 50B-2(c), and (3) a domestic violence protective order pursuant to N.C. Gen. Stat. § 50B-3. *See* N.C. Gen. Stat. § 50B-2; -3 (2007). The aggrieved party is not required to request an emergency or ex parte order prior to seeking entry of a DVPO. *See* N.C. Gen. Stat. § 50B-3. We must therefore consider defendant's arguments as to the DVPO of 10 March 2008, as these are independent of the issues regarding the ex parte DVPO.

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4. N.C. Gen. Stat. § 50B-2(b) provides that "A party may move the court for emergency relief if he or she believes there is a danger of serious and immediate injury to himself or herself or a minor child. A hearing on a motion for emergency relief, *where no ex parte order is entered*, shall be held after five days' notice of the hearing to the other party or after five days from the date of service of process on the other party, whichever occurs first, provided, however, that no hearing shall be required if the service of process is not completed on the other party. If the party is proceeding pro se and does not request an ex parte hearing, the clerk shall set a date for hearing and issue a notice of hearing within the time periods provided in this subsection, and shall effect service of the summons, complaint, notice, and other papers through the appropriate law enforcement agency where the defendant is to be served." N.C. Gen. Stat. § 50B-2(b) (2007) (emphasis added).

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N.C. Gen. Stat. § 50B-3(a) provides that if the trial court “finds that an act of domestic violence has occurred, the court shall grant a protective order restraining the defendant from further acts of domestic violence.” N.C. Gen. Stat. § 50B-3. Again, we must first consider “whether there was competent evidence to support the trial court’s findings of fact[.]” *Burress* at —, 672 S.E.2d at 734.

For the 10 March 2008 hearing, unlike the 19 November 2007 ex parte hearing, we do have the transcript. Therefore, from the record before us, it is apparent that at the 10 March 2008 hearing, plaintiff presented absolutely *no* evidence before the trial court. The most troubling aspect of this case is that the transcript of the hearing reveals that the trial judge granted the order without hearing any evidence because he “heard it on the criminal end.” In other words, because he was the judge presiding over the criminal case in which charges stemming from this incident were brought against defendant, the trial judge concluded that he need not hear any evidence regarding this civil matter.

N.C. Gen. Stat. § 1A-1, Rule 43(a) requires that “[i]n all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules.” N.C. Gen. Stat. § 1A-1, Rule 43(a). Furthermore, neither the Rules of Civil Procedure nor Chapter 50B exempts hearings pursuant to N.C. Gen. Stat. § 50B-3 from the requirement that the trial court hear testimony from witnesses.

At the 14 April 2008 hearing on defendant’s motion, *inter alia*, for a new trial, the trial judge stated that he had presided over the defendant’s trial in criminal court and that at that trial

we weren’t beyond a reasonable doubt which is a higher standard in criminal court but in civil court but that we would be to a preponderance of the evidence. That’s why I indicated at that time to the defense attorney that it would probably be appropriate that I hear the civil case so that I can enter the Order having already used a lot of Court time hearing the criminal case and indicated at that time that I would more than likely be inclined to enter that Order.

Although we appreciate the trial court’s concern for judicial economy, a judge’s own personal memory is not evidence. The trial court does not have authority to issue an order based solely upon the court’s own personal memory of another entirely separate proceeding, and it should be obvious that the evidence which must “be taken

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orally in open court” must be taken *in the case which is at bar*, not in a separate case which was tried before the same judge.<sup>5</sup> Appellate review of the sufficiency of the evidence to support the trial court’s findings of fact is impossible where the evidence is contained only in the trial judge’s memory.

Plaintiff argues that because defendant failed to file an answer to the complaint, the allegations of the complaint “became judicial admissions that required no further proof, were conclusive, and eliminated entirely any issues to be tried.” Plaintiff cites no cases as authority for the proposition and bases this assertion only upon N.C. Gen. Stat. § 1A-1, Rule 8(d), which provides in pertinent part that “[a]verments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading.” N.C. Gen. Stat. § 1A-1, Rule 8(d). Plaintiff therefore asserts that the trial judge could have based the DVPO upon the allegations of the verified complaint, without hearing any additional evidence, because defendant did not file an answer denying the allegations of the complaint.

Plaintiff’s argument fails for two reasons. First, the trial court specifically did not rely upon defendant’s failure to answer the complaint to enter the DVPO, but instead relied upon the trial court’s own personal recollection of the criminal trial. Secondly, plaintiff did not file a motion for entry of default judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 55(a) against defendant for his failure to answer. *See generally Bell v. Martin*, 299 N.C. 715, 721, 264 S.E.2d 101, 105 (1980) (“Once the default is established defendant has no further standing to contest the factual allegations of plaintiff’s claim for relief. If he wishes an opportunity to challenge plaintiff’s right to recover, his only recourse is to show good cause for setting aside the default[.]” (citations and quotation marks omitted)); *Spartan Leasing v. Pollard*, 101 N.C. App. 450, 460, 400 S.E.2d 476, 482 (1991). (“The effect of an entry of default is that the defendant against whom entry of default is made is deemed to have admitted the allegations in plaintiff’s complaint, G.S. § 1A-1, Rule 8(d), and is prohibited from defending on the merits of the case.”).

Plaintiff further argues that the trial court could take “judicial notice of the testimony previously presented” in the criminal matter. N.C. Gen. Stat. § 8C-1, Rule 201 controls when the court may take

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5. Certainly the transcript of testimony from the criminal trial, assuming that one existed, could have been used as evidence if the transcript had been properly offered and admitted into evidence at the DVPO hearing.

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judicial notice of adjudicative facts. Rule 201 provides that “[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” N.C. Gen. Stat. § 8C-1, Rule 201. “A fact is considered indisputable if it is so well established as to be a matter of common knowledge. Conversely, a court cannot take judicial notice of a disputed question of fact.” *Hinkle v. Hartsell*, 131 N.C. App. 833, 835, 509 S.E.2d 455, 458 (1998) (citation and quotation marks omitted). Plaintiff does not contend that the facts as alleged regarding defendant’s acts of domestic violence were “not subject to reasonable dispute[.]” N.C. Gen. Stat. § 8C-1, Rule 201, but relies only upon the fact that the trial judge had already heard these same facts being disputed, apparently quite vigorously, in criminal court. Judicial notice is entirely inappropriate for factual issues such as those presented by this case. Accordingly, as no evidence was presented before the trial court at the 10 March 2008 hearing, there was no “competent evidence to support the trial court’s findings of fact[.]” *Burress* at —, 672 S.E.2d at 734. Therefore, we reverse the DVPO.

## V. Conclusion

We affirm the trial court’s entry of the ex parte DVPO and reverse the DVPO. As we are reversing the DVPO, we need not address defendant’s other arguments.

AFFIRMED IN PART; REVERSED IN PART.

Judges ELMORE and ERVIN concur.

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No. COA09-9

(Filed 17 November 2009)

**1. Public Assistance— Medicaid—Medicare as third-party provider**

The trial court did not err by concluding that the Division of Medical Assistance (which administers North Carolina's Medicaid program) had the authority to recoup money from hospitals where third-party payment sources such as Medicare were available. The hospitals bear the responsibility for pursuing payment from Medicare, and the court's declaratory judgment granting summary judgment for defendants was affirmed.

**2. Constitutional Law— recovery of Medicaid payments—no federal right—no property interest**

The trial court did not err by concluding that plaintiffs had neither a constitutional nor a contractual cause of action in a case arising from the State's attempt to recover from providers Medicaid amounts which had been billed to and paid by the State, but which were eligible for payment by Medicare. The providers had neither a federal right nor a property interest.

Appeal by plaintiffs from an order entered 17 September 2008 by Judge Orlando F. Hudson, Jr. in Wake County Superior Court. Heard in the Court of Appeals 19 August 2009.

*Ott Cone & Redpath, P.A., by Thomas E. Cone, for plaintiffs-appellants.*

*Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Gerald K. Robbins and Assistant Attorney General Brenda Eaddy, for defendants-appellees.*

JACKSON, Judge.

Charlotte-Mecklenburg Hospital Authority; Duke University Medical Center, Mission Hospitals, Inc.; Moses Cone Health System,

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North Carolina Baptist Hospital; and Wake Medical Center (collectively, “plaintiffs”) appeal from a declaratory judgment order granting summary judgment in favor of North Carolina Department of Health and Human Services (“NCDHHS”); its Division of Medical Assistance (“DMA”); and Carmen Hooker Odom, Mark T. Benton, Carleen Massey, and Geoff Elting in their official capacities (collectively, “defendants”). For the reasons set forth below, we affirm.

The material facts of the case *sub judice* are not in dispute. Plaintiffs operate not-for-profit hospitals in North Carolina and provide medical services to North Carolina Medicaid recipients pursuant to contractual agreements with defendants. Plaintiffs also provide medical services to Medicare recipients pursuant to contractual agreements with the federal Medicare program.

NCDHHS is an administrative agency of the State of North Carolina and is responsible for meeting the human service needs of portions of North Carolina’s population. NCDHHS supervises the administration of North Carolina’s Medicaid program. DMA is a division of NCDHHS and is responsible for administering the State’s Medicaid program.

In 2005, defendants contracted with Health Management Systems, Inc. (“HMS”) to identify hospital services which had been billed to and paid for by Medicaid, but for which potential third-party payment sources, including Medicare, also were available.

On 26 October 2005, DMA mailed to plaintiffs lists compiled by HMS of accounts for which Medicaid had been billed and paid, but which were eligible for payment by Medicare. The letters advised plaintiffs to review their records, to submit bills to Medicare, and to send a refund to DMA within sixty days. If plaintiffs failed to bill Medicare or to advise HMS of the reasons for which plaintiffs could not recover payments from Medicare, DMA would recoup funds it had paid through Medicaid that Medicare should have paid or could pay.

Plaintiffs objected to reviewing their records and submitting bills to Medicare as an alternative means of payment for the accounts identified by the HMS lists. On 19 December 2005, plaintiffs filed an action seeking a declaratory judgment to declare defendants’ actions to be contrary to law, null, and void. On 30 July 2008 and 31 July 2008, plaintiffs and defendants, respectively, filed motions for summary judgment accompanied by supporting affidavits and discovery. On 17 September 2008, the trial court entered a declaratory judgment order

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in defendants' favor and granted defendants' motion for summary judgment. From the trial court's order, plaintiffs appeal.

Previously, we have held that "summary judgment is an appropriate procedure in a declaratory judgment action." *Montgomery v. Hinton*, 45 N.C. App. 271, 273, 262 S.E.2d 697, 698 (1980) (citations omitted). See also *Hejl v. Hood, Hargett & Assocs.*, — N.C. App. —, —, 674 S.E.2d 425, 427 (2009). In reviewing an order for summary judgment, this Court must make a two-step determination as to whether "(1) the relevant evidence establishes the absence of a genuine issue as to any material fact, and (2) either party is entitled to judgment as a matter of law." *Guthrie v. Conroy*, 152 N.C. App. 15, 21, 567 S.E.2d 403, 408 (2002) (citing *Von Viczay v. Thoms*, 140 N.C. App. 737, 738, 538 S.E.2d 629, 630 (2000), *aff'd*, 353 N.C. 445, 545 S.E.2d 210 (2001) (per curiam)). Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2007). By submitting cross-motions for summary judgment, the parties have effectively conceded that there is no genuine issue of material fact. See *Erie Ins. Exch. v. St. Stephen's Episcopal Church*, 153 N.C. App. 709, 711, 570 S.E.2d 763, 765 (2002). Therefore, we need only determine which party is entitled to judgment as a matter of law.

**[1]** On appeal, plaintiffs argue that the trial court erred in concluding that DMA has the authority to recoup money from hospitals when the underlying Medicaid claims properly had been billed and paid and that the trial court erred in concluding that the hospitals bear the responsibility for pursuing payment from Medicare as a third-party payor after properly accepting Medicaid as payment in full as required by State and federal law. We disagree. Because plaintiffs' arguments require analysis of substantially interrelated rules, we address together both questions presented.

" '[A]n administrative agency is a creature of the statute creating it and has only those powers expressly granted to it or those powers included by necessary implication from the legislature [sic] grant of authority.' " *Boston v. N.C. Private Protective Services Bd.*, 96 N.C. App. 204, 207, 385 S.E.2d 148, 150-51 (1989) (quoting *In re Williams*, 58 N.C. App. 273, 279, 293 S.E.2d 680, 685 (1982)). In performing its function, the power of an agency to interpret a statute that it administers is limited by the actions of the legislature. See, e.g., *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43, 81 L. Ed. 2d

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694, 703 (1984); *see also* *Watson Industries v. Shaw, Comr. of Revenue*, 235 N.C. 203, 211, 69 S.E.2d 505, 511 (1952). If the legislature unambiguously expressed its intent in the statute, then the agency administering that statute must give effect to that intent. *See N.C. Comm'r of Labor v. Weekley Homes, L.P.*, 169 N.C. App. 17, 22-23, 609 S.E.2d 407, 412 (2005) (citing *Chevron*, 467 U.S. at 842-43, 81 L. Ed. 2d at 703). But, if the legislature was silent or ambiguous on the specific issue, then the agency has room to construe the statute. *See id.* “‘Although the interpretation of a statute by an agency created to administer that statute is traditionally accorded some deference by appellate courts, those interpretations are not binding.’” *Martin v. N.C. Dep’t of Health & Hum. Servs.*, 194 N.C. App. 716, 719, 670 S.E.2d 629, 632 (2009) (quoting *Total Renal Care of N.C., L.L.C. v. N.C. Dep’t of Health & Hum. Servs.*, 171 N.C. App. 734, 740, 615 S.E.2d 81, 85 (2005)). “‘The weight of [an administrative agency’s] interpretation in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.’” *Id.* (quoting *Total Renal Care of N.C., L.L.C. v. N.C. Dep’t of Health & Hum. Servs.*, 171 N.C. App. 734, 740, 615 S.E.2d 81, 85 (2005)).

Under Medicare Part A, the federal government makes payments to “providers of services” for services provided to Medicare beneficiaries. 42 U.S.C. § 1395f(a) (2000). A “provider of services” is a statutorily defined term that includes hospitals and other specified medical facilities. 42 U.S.C. § 1395x(u) (2000). Section 1395f(a)(1) delegates to the Secretary of Health and Human Services (“the Secretary”) the authority to determine who may file claims under such agreements:

Except as provided in subsections (d) and (g) and in section 1395mm . . . , payment for services furnished an individual may be made only to providers of services which are eligible therefore under section 1395cc of this title and only if —

(1) written request . . . is filed for such payment in such form, in such manner, and by such person or persons as the Secretary may by regulation prescribe . . . .

42 U.S.C. § 1395f(a)(1) (2000).

Federal regulations promulgated by the Secretary require that all initial claims for payment for medical services pursuant to Part A of

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the Medicaid program be submitted by the providers of those services. 42 C.F.R. § 424.33 (2005). The Secretary has defined “provider” as follows:

Provider means a hospital, a [critical access hospital], a skilled nursing facility, a comprehensive outpatient rehabilitation facility, a home health agency, or a hospice that has in effect an agreement to participate in Medicare, or a clinic, a rehabilitation agency, or a public health agency that has in effect a similar agreement but only to furnish outpatient physical therapy or speech pathology services, or a community mental health center that has in effect a similar agreement but only to furnish partial hospitalization services.

42 C.F.R. § 400.202 (2005). The requirement applies whether payment is sought in the first instance pursuant to Medicare or whether payment is sought pursuant to Medicare for claims that previously were paid by Medicaid.

At times relevant to the actions in the case *sub judice*<sup>1</sup>, North Carolina General Statutes, section 108A-54 gave NCDHHS broad authority to enact rules, regulations, policies and procedures to effectuate the purpose of the Medicaid program, and to direct how payments are to be made. *See* N.C. Gen. Stat. § 108A-54 (2005). DMA has been empowered by State regulation to establish “methods and procedures to ensure the integrity of the Medicaid program.” 10A N.C. Admin. Code 22F.0101 (2004). The DMA’s program integrity section periodically conducts post-payment reviews or audits of claims submitted by Medicaid providers to DMA and reviews payments made to Medicaid providers. *See* 10A N.C. Admin. Code 22F.0102, .0103, .0105 (2004).

The Social Security Act, the enabling statute for medical assistance programs, mandates that State Medicaid agencies ascertain the liability of third parties and seek reimbursement for such assistance. 42 U.S.C. § 1396a(a)(25)(A),(B) (2000). “Thus, on its face, [the Social Security Act] seeks to protect the Medicaid program from paying for health care in situations where a third party has a legal obligation to pay for the care.” *Wesley Health Care Ctr., Inc. v. DeBuono*, 244 F.3d 280, 284 (2d Cir. 2001).

Additionally, federal regulations mandate that each State Medicaid program set up procedures to assess “[t]he legal liability of third parties to pay for services provided under the plan[.]” 42 C.F.R.

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1. We note that the material portions of the provisions cited remain in effect.

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§ 433.135(a) (2005). A third party is broadly defined as “any individual, entity or program that is or may be liable to pay all or part of the expenditures for medical assistance furnished under a State plan.” 42 C.F.R. § 433.136 (2005). In North Carolina, the DMA’s third party recovery section is responsible for carrying out this requirement. This section’s purpose is to ensure that Medicaid covers medical expenses only after all other available medical insurance has been applied and exhausted. This is because Medicaid is a “payor of last resort.” *Duke Univ. Med. Ctr. v. Bruton*, 134 N.C. App. 39, 44, 516 S.E.2d 633, 636 (1999) (quoting *Virginia, Inc., v. Kozlowski et al.*, 42 F.3d 1444, 1448 (4th Cir. 1994)).

However, federal regulations also require “state agencies [to] pay the full Medicaid benefits when [p]robable [third-party] liability is not established or benefits are not available at the time the claim is filed.” *Bruton*, 134 N.C. App. at 49, 516 S.E.2d at 639 (citing 42 C.F.R. § 433.139(c)) (internal quotation marks omitted). “‘If the probable existence of third party liability cannot be established or third party benefits are not available to pay the recipient’s medical expenses at the time the claim is filed, the agency must pay the full amount allowed under the agency’s payment schedule.’” *Id.* (quoting 42 C.F.R. § 433.139(c)).

In the case *sub judice*, the regulations, by their plain terms, require that any claim for payment under Medicare Part A be submitted by the provider of services. 42 C.F.R. § 424.33 (2005). Other sources within the Medicare statute support this requirement. The statutory section that authorizes the Secretary to establish the claims-filing procedures for Part B services furnished by providers, *see* 42 U.S.C. § 1395n (2000), is titled “Procedure for payment of claims of *provider of services*.” *Id.* (emphasis added). This heading reflects Congress’s intent that the power to file a claim for payment belongs to the provider and, thus, may be filed only by the provider. *See* 42 U.S.C. § 1395f(a) (2000); 42 U.S.C. § 1395n (2000); 42 C.F.R. § 400.202 (2005); 42 C.F.R. § 424.33 (2005). Similarly, the statute directs that a Part A payment must be made to the provider, 42 U.S.C. § 1395f(a) (2000), and that such payment may not be made to any other person under an assignment or power of attorney, except in specific circumstances inapplicable to the case *sub judice*. *See* 42 U.S.C. § 1395g(c) (2000). Accordingly, the claim must be filed by the provider.

Such regulations are a reasonable interpretation of the Medicare statutes pursuant to an explicit congressional delegation of rule-mak-

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ing authority. *See* 42 U.S.C. § 1395f(a)(1) (2000) (stating “by such person or persons as the Secretary may by regulation prescribe”). Because the agency’s interpretation was “a reasonable and permissible construction of the statute[,]” we give deference to the agency’s interpretation. *See N.C. Comm’r of Labor*, 169 N.C. App. at 22, 609 S.E.2d at 412 (citation omitted).

However, plaintiffs contend that United States Code, Title 42, section 1396a(a)(25)(B), a provision within the Medicaid statutes, overrides the Medicare claims-filing requirements and obligates DMA to file claims with the Secretary upon discovery that Medicare initially should have paid a claim previously paid by DMA. *See* 42 U.S.C. § 1396a(a)(25)(B) (2000). Section 1396a(a)(25)(B) of the Medicaid statute provides,

in any case where [third-party] legal liability is found to exist after medical assistance [pursuant to the Medicaid statutes] has been made available on behalf of the individual and where the amount of reimbursement the State can reasonably expect to recover exceeds the costs of such recovery, the State or local agency will seek reimbursement for such assistance to the extent of such legal liability[.]

*Id.*

Plaintiffs’ argument is unpersuasive because nothing in this provision suggests that Congress intended to authorize the States to override the claims-filing requirements of Medicare. If Congress had intended this result, we must presume it would have used stronger and more explicit language than “seek reimbursement” to indicate clearly that the State should seek reimbursement directly from the Secretary. Congress could have expressed its intent to override the claims-filing requirements of Medicare and other third parties with explicit language, which it used in other provisions. *See* 42 U.S.C. § 1395y(b)(2)(B)(vi) (Supp. 2004) (authorizing Medicare to recover its conditional payments from a primary employer group health plan within a three year period “[n]otwithstanding any other time limits . . . for filing a claim” established by such plan). Congress also could have provided the States with the same independent right of recovery available to the United States under the Medical Care Recovery Act. *See* 42 U.S.C. § 2651(a) (2000) (“[T]he United States shall have a right to recover (independent of the rights of the injured or diseased person) from said third person, or that person’s insurer . . .”). However, no such indication of legislative intent can be found within section 1396a(a)(25)(B).

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Furthermore, when viewed in conjunction with similar provisions found elsewhere in the Medicaid statute, section 1396a(a)(25)(B) mandates the conclusion that its concern is not with overriding claims-filing requirements of the Medicare program or other third parties, but rather with ensuring that the rights of Medicaid beneficiaries are subrogated to the States. *See* 42 U.S.C. § 1396a(a)(25)(B) (2000). In particular, section 1396a(a)(25)(B) must be read in conjunction with section 1396k(a)(1)(A), which requires each Medicaid recipient “to assign the State [his or her] rights” to payment for medical care from a third party as a condition of eligibility for medical assistance under a State Medicaid plan. *See also* 42 U.S.C. §§ 1396a(a)(25)(H), 1396a(a)(45) (2000). The most logical reading of these two sections is not that they authorize the States to override the claims-filing requirements of Medicare and other third parties, but rather that their provisions merely require the States to “stand in the shoes” of their recipients; that is, to seek reimbursement from liable third parties in accordance with whatever rights the recipients would have had to obtain such reimbursement. *See Commonwealth v. Philip Morris, Inc.*, 942 F. Supp. 690, 695 n.5 (D. Mass. 1996) (“What Title XIX requires is that States take steps to stand in the legal shoes of Medicaid recipients who have valid claims for medical expenses against third parties.”). *See also Michigan Dep’t of Soc. Servs. v. Shalala*, 859 F. Supp. 1113, 1121 (W.D. Mich. 1994) (“DSS, as subrogee, obtained no greater rights than the beneficiaries, and may obtain reimbursement [from Medicare] only upon timely filed claims.”).

The interplay between the Medicare and Medicaid statutes as they apply to dual-eligibles<sup>2</sup> and the applicable regulations make clear that only providers of services can submit Medicare reimbursement claims on behalf of Medicaid recipients later determined to be eligible for Medicare. Since DMA does not meet the statutory or regulatory definition of “provider of services,” it cannot submit claims pursuant to Medicare Part A. *See* 42 U.S.C. § 1395x(u) (2000); 42 C.F.R. § 400.202 (2005).

However, as the Director of the Department of Health & Human Services, Center for Medicaid and State Operations explained in State Medicaid Director Letter # 03-004,

neither the Medicare nor Medicaid statute, nor [D]HHS’s regulations or policies prohibit any state from recouping its Medicaid

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2. People who are beneficiaries under both Medicare and Medicaid are referred to as “dual eligibles.” *Bruton*, 134 N.C. App. at 43, 516 S.E.2d at 636.

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payment from providers in the situation where: . . . (2) a . . . state (as the beneficiary's subrogee) timely requests the provider to file a claim with Medicare and the provider fails to submit timely a claim to Medicare for the service at issue . . . .

State Medicaid Director Letter, # 03-004 (2003). Additionally, the Medicare statute that specifies the contents of provider agreements, states in relevant part that a Medicare provider must agree

not to charge . . . any individual or any other person for items or services for which such individual is entitled to have payment made under [Medicare] (or for which he would be so entitled if such provider of services had complied with the procedural and other requirements under or pursuant to [the Medicare statute]).

42 U.S.C. § 1395cc(a)(1)(A) (2000).

Where, as here, a State determines that it has paid for services for which Medicare coverage is available, it can request the provider to submit a claim for payment under Medicare. If the fiscal intermediary approves the claim, the provider then will be obligated pursuant to its Medicare provider agreement to refund the Medicaid payment to the State. *See, e.g., Conn. Dep't of Social Servs. v. Leavitt*, 428 F.3d 138, 142 (2d Cir. 2005) ("When Medicare covers services already paid for by Medicaid, Medicare pays the provider for the services, and then Medicaid can seek reimbursement from the provider for Medicaid's initial erroneous payment.").

Since DMA is not a "provider of services," it may not file a claim with Medicare. Instead, the statutory and regulatory framework requires that Medicare claims be submitted by the providers of services. Consequently, summary judgment in favor of defendants was appropriate in this matter because defendants proved that an essential element of plaintiffs' claim—that DMA must recover third party payment for claims directly from Medicare—is not consistent with applicable law. *See Guthrie*, 152 N.C. App. at 21, 567 S.E.2d at 408.

Plaintiffs also argue that the responsibility for pursuit of third-party payments falls to the State. Plaintiffs and defendants have ratified the "payor of last resort" concept in the contractual agreement these hospitals signed in order to become Medicaid providers in the North Carolina Medicaid program. Specifically, in paragraph A.8 of each provider's Medicaid participation agreement, each plaintiff agreed to "[d]etermine responsibility and bill all appropriate third parties prior to billing the Medicaid Program." The North Carolina

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State Medicaid Plan sets forth how DMA, in conjunction with assistance from Medicaid providers upon their initial payment request submission to DMA, identifies third-party resources. State regulations allow DMA to recover improper payments as appropriate, 10A N.C. Admin. Code 22F, *et seq.*, and the North Carolina Medicaid Participation Agreement signed by Medicaid providers allows DMA to recover overpayments.

In many instances, as in the case *sub judice*, the third-party payor does not pay the Medicaid recipient's bill for medical services before DMA applies Medicaid funds to the medical bill. The "payor of last resort" rules require that all other available insurance should be identified, applied, and exhausted before Medicaid's final responsibility for payment for medical services is established. Therefore, it would not be unusual for a Medicaid provider to pay back Medicaid funds it received on a claim to DMA. Plaintiffs' contention that, once plaintiffs are paid, plaintiffs cannot return funds to DMA, is contrary to both federal and State regulation as well as the program integrity mandate.

Accordingly, we hold that the trial court did not err in concluding that DMA has the authority to recoup money from hospitals when the underlying Medicaid claims properly had been billed and paid and that the hospitals bear the responsibility to pursue payment from Medicare as a third-party payor after properly accepting Medicaid as payment in full as required by State and federal law.

**[2]** Next, plaintiffs contend that the trial court erred in concluding that plaintiffs had neither a constitutional nor a contractual cause of action. We disagree.

Pursuant to United States Code, Title 42, section 1983, an injured party has the power to seek redress for a violation of that party's federal rights by a State or a State agent. 42 U.S.C. § 1983 (2000); *Gilbert v. N.C. State Bar*, 363 N.C. 70, 80, 678 S.E.2d 602, 608 (2009). Section 1983 provides in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

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42 U.S.C. § 1983 (2000). However, the violation of a federal statute alone does not raise a basis for a section 1983 claim. *Blessing v. Freestone*, 520 U.S. 329, 340, 137 L. Ed. 2d 569, 581-82 (1997). The violation of federal law also must implicate a federal right possessed by the appellant. *Id.* The appellant must satisfy a three-part test to show that a federal statute created a federal right. *DeBuono*, 244 F.3d at 283.

First, Congress must have intended that the provision in question benefit the [appellant]. Second, the [appellant] must demonstrate that the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States.

*Id.* at 283-84 (internal citations and quotation marks omitted).

In the case *sub judice*, the statute at issue is United States Code, Title 42, sections 1396a(a)(25)(A) and (B). Since section 1396a(a)(25) “does not confer a federal right under 42 U.S.C. § 1983 upon health care providers,” plaintiffs do not have a viable federal claim cognizable under Title 42, section 1983 of the United States Code. *See DeBuono*, 244 F.3d at 283. The purpose of the third-party liability provisions of the Medicaid Act was “to protect the Medicaid program from paying for health care in situations where a third party has a legal obligation to pay for the care.” *Id.* at 284. In the instant case, DMA is attempting to ensure that plaintiffs—all Medicare and Medicaid providers—comply with their obligations to bill Medicare for appropriate claims. DMA is protecting itself from paying for health care when a third party has a legal obligation to pay. Since plaintiffs do not possess a federal right here, their section 1983 claim fails.

Additionally, there was no taking of a property interest. The Medicaid recipient is required to assign his right to medical insurance proceeds to the State. *Bruton*, 134 N.C. App. at 48, 516 S.E.2d at 639 (citing 42 U.S.C. § 1396k(a)(1)(A) (2000)). This assignment of rights grants the State an interest superior to that of the provider. *DeBuono*, 244 F.3d at 285. Thus, plaintiffs have no right to hold DMA to the terms of its contracts under North Carolina law.

Accordingly, we hold that the trial court did not err in concluding that plaintiffs had neither a constitutional nor a contractual cause of action.

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Finally, plaintiffs argue that the trial court erred by admitting into evidence an affidavit by Diana Pirozzi and related materials. However, at oral argument, counsel for plaintiffs conceded that the contested evidence does not create a genuine issue of material fact. Accordingly, we do not address the issue on appeal.

For the foregoing reasons, the trial court's declaratory judgment order granting summary judgment in defendants' favor is affirmed.

Affirmed.

Judges McGEE and ERVIN concur.

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SHERYL BOYLAN, EMPLOYEE, PLAINTIFF v. VERIZON WIRELESS, EMPLOYER,  
SEDGWICK CMS, CARRIER, DEFENDANTS

No. COA09-350

(Filed 17 November 2009)

**1. Workers' Compensation— attendant care services—retroactive compensation**

The trial court did not err in a workers' compensation case by ordering defendants to pay retroactively for attendant care services provided to plaintiff. N.C.G.S. § 97-90(a) does not require pre-approval of fees charged by health care providers other than physicians, hospitals or other medical facilities.

**2. Workers' Compensation— attendant care services—medical benefit—supporting evidence**

There was competent evidence in a workers' compensation case to support the Industrial Commission's findings and conclusion that plaintiff benefitted medically from attendant care services.

**3. Workers' Compensation— attendant care services—number of hours required—findings**

The findings of the Industrial Commission in a worker's compensation case sufficiently established the number of hours of attendant care required by plaintiff.

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**4. Appeal and Error— appealability—workers’ compensation—attorney fee award—direct appeal—dismissed**

A workers’ compensation issue was dismissed on appeal where the matter involved the reduction of an attorney fee award by the Industrial Commission, plaintiff appealed directly, and N.C.G.S. § 97-90(c) required appeal of the issue to the superior court.

**5. Workers’ Compensation— failure to find permanent and total disability—supporting evidence**

There was competent evidence in a workers’ compensation case to support the Industrial Commission’s findings and conclusion that plaintiff was not permanently and totally disabled.

**6. Workers’ Compensation— life care planning—necessity—abuse of discretion standard**

The Industrial Commission did not abuse its discretion by failing to find that plaintiff needed life care planning as a necessary medical treatment. The Commission gave proper consideration to testimony on the subject.

Appeal by defendants and cross-appeal by plaintiff from Opinion and Award entered 9 December 2008 by the North Carolina Industrial Commission. Heard in the Court of Appeals 13 October 2009.

*The Hodgman Law Firm, by Heather Hodgman Jahnes and Robert S. Hodgman, for plaintiff cross-appellant.*

*Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Vachelle Willis and Dana C. Moody, for defendant-appellants.*

BRYANT, Judge.

Employer Verizon Wireless, self-insured, and servicing agent Sedgwick CMS, collectively defendants,<sup>1</sup> appeal from an Opinion and Award entered by the North Carolina Industrial Commission granting plaintiff employee Sheryl Boylan an award for a compensable injury. For the reasons stated herein, we affirm in part and dismiss in part.

*Facts*

On 21 July 2003, while working for Verizon Wireless in Greensboro, North Carolina, plaintiff tripped over a box, fell to the

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1. Though Verizon Wireless is self-insured and Sedgwick CMS, a servicing agent, the caption of the opinion remains in accord with the caption of the Opinion and Award entered by the North Carolina Industrial Commission 9 December 2008.

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floor, and injured her back. Verizon Wireless accepted the compensability of the injury. Verizon Wireless was insured by Sedgwick CMS. Defendant filed a Form 60—Employer's Admission of Employee's Right to Compensation—with the Industrial Commission after which defendants paid Boylan total disability compensation at the rate of \$370.98 per week.

In December 2003 and in May 2004, MRIs revealed a “small central disc protrusion at L5-S1” in the lumbar spine. Despite a year of treatment, including physical therapy and lumbar injections, plaintiff's pain in her lower back worsened and radiated into her legs.

On 23 August 2004, Dr. Henry Poole, with Carolina Neurosurgery, P.A., diagnosed plaintiff with a degenerative disk at the L5-S1 level and performed a L5-S1 decompression and fusion surgery. Plaintiff continued to suffer pain, weakness, and limited range of motion. She had difficulty maneuvering around her home and suffered frequent falls. Plaintiff was unable to get into or out of a bathtub by herself, dress herself, prepare her own meals, clean, do yard work, run errands or drive herself to medical appointments.

In August 2004, approximately two weeks prior to plaintiff's surgery, her daughter, Misty Boylan, moved from Georgia into plaintiff's house in Staley, North Carolina and assisted with daily living activities. Misty worked outside of her mother's home during the third-shift. During the day, she provided eight-to-nine hours of live-in care: cooking meals, assisting with bathing and hygiene, cleaning, washing clothes, and driving plaintiff on errands and medical appointments. Averaging eight hours per day for seven days a week, the Commission determined that Misty provided fifty-six hours of live-in care per week. In October 2007, Misty moved back to Georgia.

After Misty moved out, plaintiff moved from Staley to Jamestown to be close to her sister, Regina Locklear. Regina checked on plaintiff before going to work in the morning, then returned to stay with plaintiff from 5:30 p.m. to between 8:30 and 9:00 p.m. Regina also stayed with plaintiff most of the weekend. Regina assisted with cooking, cleaning, laundry, and driving. Her husband, Nathan, helped with trash disposal and yard work. The Commission found that Regina and Nathan Locklear provided a combined 32 hours of care per week.

Plaintiff's rehabilitative nurse, Cheryl Yates, was assigned to plaintiff's case in 2004, and being aware of the aid provided by Boylan's family, stated in her deposition that Boylan required some level of assistance in her daily activities.

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On 14 September 2006, Dr. Albert K. Bartko, of Carolina Pain Management, specializing in physical medicine and rehabilitation, ordered an assessment of plaintiff's home to determine what modifications could be made to make it handicap accessible. Defendants contested whether the Workers' Compensation Act required that they pay for modifications to plaintiff's home. Plaintiff filed a Form 33, Request that Claim Be Assigned for Hearing.

In a hearing before Deputy Commissioner Bradley W. Houser, held 16 January 2008, plaintiff and defendants identified five issues to be addressed: whether plaintiff was 1) permanently and totally disabled; 2) entitled to receive attendant care services; 3) entitled to compensation for past attendant care services provided by family members; 4) entitled to Life Care Planning; and 5) entitled to have a home modification plan implemented for her home. On 28 April 2008, the deputy commissioner entered an opinion and award stating: defendants were to continue to pay plaintiff total disability compensation at the rate of \$370.98 per week; plaintiff was not permanently and totally disabled; plaintiff benefitted medically from prior and future attendant care services provided by her family; defendants were to pay Misty Boylan, Regina Locklear, and Nathan Locklear for their attendant care services provided to plaintiff at a rate of \$8.00 hour; defendants were to pay Regina Locklear and Nathan Locklear for subsequent attendant care services provided plaintiff at the rate of \$8.00 per hour; and defendants were to pay all related medical expenses incurred or to be incurred as a result of her compensable injury, including treatment and recommendations of Dr. Bartko when such procedures have been approved by the Industrial Commission. Furthermore, an attorney fee of 25% of the compensable award was approved for plaintiff's counsel to be deducted from amounts due plaintiff, Misty, Regina Locklear, and Nathan Locklear. Defendants were to pay all costs. Defendants appealed to the Full Commission; plaintiff cross-appealed.

On 9 December 2008, after reviewing the record, the briefs, and arguments of the parties, the Full Commission (the Commission) affirmed the Opinion and Award of the Deputy Commissioner with certain modifications. In its award, the Commission ordered defendants to continue to pay plaintiff total disability compensation at the rate of \$370.98 per week until further order of the Commission; defendants were to pay Misty, Regina Locklear, and Nathan Locklear for attendant care services provided plaintiff through the date of the Commission's Opinion and Award without any deduction for attor-

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ney's fees; defendants were to continue to pay Regina Locklear and Nathan Locklear at the rate of \$8.00 per hour for up to thirty hours per week—this also was not subject to deduction for attorney's fees; and defendants were ordered to pay for all related medical expenses incurred or to be incurred by plaintiff as a result of her 21 July 2003 compensable injury. The Commission awarded plaintiff attorney fees of 25% of the temporary total disability compensation, and defendants were to pay all costs. Defendants appeal, and plaintiff cross-appeals.

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Defendants raise the following issues on appeal: whether the Full Commission erred by I) ordering defendants to pay for retroactive attendant care services; II) awarding plaintiff any attendant care services; and III) finding the number of hours of attendant care plaintiff required in the past or requires in the future.

On cross-appeal, plaintiff questions whether the Full Commission erred by IV) disturbing the deputy commissioner's award of attorney's fees; V) concluding that plaintiff was not permanently and totally disabled; and VI) failing to conclude that plaintiff needs life care planning.

*I*

**[1]** Defendants question whether the Full Commission erred by ordering defendants to pay retroactively for attendant care services provided to plaintiff. Defendants argue that plaintiff never requested prior approval for such services in violation of the fee schedule established by the Industrial Commission pursuant to N.C. Gen. Stat. § 97-26(a) and was therefore not entitled to attendant care benefits. We disagree.

"The standard of review for an appeal from an opinion and award of the Industrial Commission is limited to a determination of (1) whether the Commission's findings of fact are supported by any competent evidence in the record; and (2) whether the Commission's findings justify its conclusions of law." *Goff v. Foster Forbes Glass Div.*, 140 N.C. App. 130, 132-33, 535 S.E.2d 602, 604 (2000) (citation omitted).

The Workers' Compensation Act, codified under Chapter 97 of our North Carolina General Statutes, states under section 97-90(a),

Fees for attorneys and charges of health care providers for medical compensation under this Article shall be subject to the

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approval of the Commission; but no physician or hospital or other medical facilities shall be entitled to collect fees from an employer or insurance carrier until he has made the reports required by the Commission in connection with the case.

N.C. Gen. Stat. § 97-90(a) (2007).

In *Ruiz v. Belk Masonry Co.*, 148 N.C. App. 675, 559 S.E.2d 249 (2002), the plaintiff was injured while employed by the defendants. After a hospital stay, the plaintiff was placed in an outpatient program under the care of his brother and received follow-up treatment with his physician. *Id.* at 676, 559 S.E.2d at 250-51. The Commission awarded the plaintiff benefits for the attendant care his brother provided. On appeal, the defendants contended that attendant care benefits were inappropriate because the plaintiff did not seek prior approval for the care. This Court reasoned as follows:

N.C.G.S. § 97-90(a) does not require pre-approval of fees charged by health care providers, except for physicians, hospitals, or other medical facilities. Plaintiff's brother does not fit into the exceptions for N.C.G.S. § 97-90(a). This interpretation is consistent with our case law, which has allowed compensation to health care providers similar to plaintiff's brother, without the Commission's pre-approval.

*Id.* at 681, 559 S.E.2d at 253-54 (emphasis omitted). On this basis, we upheld the Commission's award of attendant care benefits to the plaintiff. *Id.* at 681, 559 S.E.2d at 254. For the aforementioned reasons, we hold that the Commission did not err by ordering defendants to pay benefits retroactively for attendant care services provided to plaintiff by her family members. Accordingly, defendant's assignment of error is overruled.

## II

[2] Next, defendants argue that the Commission erred by awarding plaintiff attendant care services as there was no competent medical evidence demonstrating that these services were necessary to effect a cure, provide relief, or lessen the period of plaintiff's disability. We disagree.

Under North Carolina General Statutes, section 97-2(19),

The term "medical compensation" means medical, surgical, hospital, nursing, and rehabilitative services, and medicines, sick travel, and other treatment, including medical and surgical sup-

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plies, as may reasonably be required to effect a cure or give relief and for such additional time as, in the judgment of the Commission, will tend to lessen the period of disability . . . .

N.C. Gen. Stat. § 97-2(19) (2007).

In *Ruiz*, the defendants argued that the Commission's finding that the defendants failed to provide the plaintiff with needed attendant care was not supported by competent evidence. The Commission found that the plaintiff's brother, who was not identified as having medical training, "indicated that [the] plaintiff cannot take care of himself. [The plaintiff's brother] has to cook, clean, wash, shop, and pay bills, among other things, for [the] plaintiff. He turns on [the] plaintiff's shower and has to assist [the] plaintiff into the shower." *Ruiz*, 148 N.C. App. at 680, 559 S.E.2d at 253. Moreover,

[A] registered nurse with a Master's Degree in health administration who also is a certified life planner, drafted a life care plan for [the] plaintiff . . . . As a part of this plan, she indicated that [the] plaintiff would need attendant care for the remainder of his life. [The plaintiff's brother] has been providing care to [the] plaintiff but will be unable to continue if he is not paid.

*Id.* This Court held that there was competent evidence to support the Commission's findings of fact that the plaintiff was in need of attendant care.

Here, the Commission made the following findings of fact:

4. Subsequent to her surgery, Plaintiff continued to experience significant pain as the result of her admittedly compensable injury by accident and has been prescribed pain medications. . . .
5. In addition to her ongoing pain, Plaintiff experiences weakness and has a limited range of motion as the result of her injury by accident. . . .
6. As a result of her injury by accident, Plaintiff has difficulty maneuvering around her home and frequently falls. Plaintiff is unable to get in and out of her bathtub by herself, dress herself, prepare her own meals, clean, perform yard work, retrieve her mail, or drive for errands or medical appointments.

. . .

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9. The assistance provided to Plaintiff by her daughter[, Misty Boylan,] included cooking meals, assisting with bathing and hygiene, cleaning the home, washing clothes, and driving Plaintiff on errands and to medical appointments and the pharmacy.

...

12. Ms. Locklear assists Plaintiff with cooking, cleaning, laundry, and driving . . . as needed. Ms. Locklear's husband, Mr. Nathan Locklear, performs Plaintiff's trash disposal and yard work. . . .
13. Plaintiff's rehabilitation nurse, Ms. Cheryl Yates, was assigned to Plaintiff's case in 2004. Since that time, Ms. Yates has been aware that members of Plaintiff's family have assisted her in performing daily living activities. Ms. Yates opined that due to her current physical condition, Plaintiff needs some level of assistance in the performance of her daily living activities.

The Commission concluded that "[t]here is sufficient credible evidence of record upon which to conclude that Plaintiff benefited [sic] medically from the attendant care services provided to her by Ms. Misty Boylan, Ms. Regina Locklear, and Mr. Nathan Locklear." Upon review of the record, we hold there exists competent evidence to support the Commission's findings, and the findings support its conclusions of law. Accordingly, defendants' assignments of error are overruled.

*III*

[3] Next, defendants argue that there is no competent evidence in the record to support the Commission's findings of fact as to the number of hours of attendant care plaintiff required in the past and requires in the future. Defendants argue that there is no competent evidence in the record to support a finding that plaintiff required attendant care to the extent provided by her family. We disagree.

Here, the Commission made the following findings of fact:

10. Based upon eight hours of care per day, seven days a week, Ms. Misty Boylan provided Plaintiff 56 hours of care per week during the period of August 23, 2004 to October 2007.

...

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12. Combined, Ms. Regina Locklear and Mr. Nathan Locklear have provided 32 hours of care per week, based upon four hours of care during the weekdays and six hours per day on weekends, since October 2007.

...

13. Ms. Yates [plaintiff's rehabilitative nurse] opined that due to her current physical condition, Plaintiff needs some level of assistance in the performance of her daily living activities.

...

15. [T]here is sufficient credible evidence of record upon which to find that Plaintiff benefited [sic] medically from the attendant care services provided to her by Ms. Misty Boylan, Ms. Regina Locklear, and Mr. Nathan Locklear.

16. [T]here is sufficient credible evidence of record upon which to find that Plaintiff would benefit medically from ongoing attendant care services to be provided by Ms. Regina Locklear and Mr. Nathan Locklear for her activities of daily living.

We note that the Commission also found that “[o]n April 30, 2007, Dr. Bartko recommended that Plaintiff be evaluated by an occupational therapist regarding her need for assistance with the activities of daily living. As of the date of the decision by the Deputy Commissioner, this evaluation had not been performed.” We hold that the Commission’s findings of fact sufficiently establish the number of hours of attendant care plaintiff required in the past and reasonably will require in the future. Accordingly, we overrule defendants’ assignment of error.

*IV*

[4] Next, on cross-appeal, plaintiff argues that the Commission abused its discretion in disturbing an award of attorney’s fees. We dismiss this assignment of error.

Section 97-90(c) first sets the procedure for appealing attorney fee awards where there is a fee agreement, and then addresses appeals in all other cases. Where an attorney has a fee agreement under the Worker’s Compensation Act, and the Commission finds the fee agreement unreasonable, the attorney may, “appeal to the senior resident judge of the superior court in the county in which the cause

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of action arose or in which the claimant resides” where the superior court shall “determine in his discretion the reasonableness of said agreement or fix the fee . . . .” N.C.G.S. § 97-90(c) (2007). Where the attorney has no agreement for compensation and yet disputes the fee awarded by the Commission, the attorney may “appeal to the senior resident judge of the superior court of the district of the county in which the cause arose or in which the claimant resides . . . .” N.C.G.S. § 97-90(c).

In *Davis v. Trus Joist MacMillan*, 148 N.C. App. 248, 558 S.E.2d 210 (2002), this Court considered whether the Commission abused its discretion in reducing a deputy commissioner’s attorney fee award. The Full Commission reduced the award set by the deputy commissioner, and the plaintiff appealed to this Court. We held that “[b]ecause any dispute as to attorney’s fees must be appealed according to the procedures set out in section 97-90(c), we are without jurisdiction to hear the issue and must dismiss the appeal . . . .” *Id.* at 255, 558 S.E.2d at 215.

Here, as in *Davis*, the attorney fee award set by the deputy commissioner was not a ground on which the appeal to the Full Commission was based; however, the Commission reduced the attorney fee award. Plaintiff appeals directly to this Court. Section 97-90(c) requires appeal of this issue to the senior resident superior court judge of the district of the county in which the cause arose or in which the claimant resides. *See* N.C.G.S. 97-90(c) (2007). Therefore, pursuant to *Davis*, we are without jurisdiction to hear the issue and must dismiss this assignment of error. *See Davis*, 148 N.C. App. 248, 558 S.E.2d 210.

## V

[5] Next, plaintiff argues that the Commission erred by failing to conclude that plaintiff is permanently and totally disabled. We disagree.

“In passing upon issues of fact, the Industrial Commission is the sole judge of the credibility of the witnesses and the weight to be given to their testimony. . . . The findings of the Industrial Commission are conclusive on appeal when supported by competent evidence even though there be evidence to support a contrary finding.” *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683-84 (1982) (internal citations omitted).

“An employee injured in the course of his employment is disabled under the [Workers’ Compensation] Act if the injury results in an

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incapacity . . . to earn the wages which the employee was receiving at the time of injury in the same or any other employment.” *Russell v. Lowes Prod. Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (citation omitted). “In workers’ compensation cases, a claimant ordinarily has the burden of proving both the existence of his disability and its degree.” *Hilliard*, 305 N.C. at 595, 290 S.E.2d at 683 (citation omitted).

The employee may meet this burden in one of four ways: (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

*Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457 (internal citations omitted).

Here, the deputy commissioner and the Full Commission considered the deposition testimony of Dr. Otis Delano Curling, Jr., tendered as an expert in neurosurgery. Dr. Curling testified that he examined plaintiff on 15 July 2004 and again on 13 September 2006. At the time of his examinations, Dr. Curling did not believe plaintiff to be at maximum medical improvement. He further testified to his belief that she was capable of sedentary work. Plaintiff testified before the deputy commissioner that she was fifty years of age, had graduated from high school, and that prior to working for Verizon Wireless she was employed as a receptionist. The Commission made the following finding of fact: “Based upon the totality of the credible evidence of record, and upon Plaintiff’s age, education and vocational history, the Full Commission finds that Plaintiff is not permanently and totally disabled.” The Commission concluded that “[b]ased upon the totality of the credible evidence of record, and upon Plaintiff’s age, education, and vocational history, Plaintiff is not permanently and totally disabled.” We hold that the record contains competent evidence to support the Commission’s finding of fact which in turn supports its conclusion of law. Accordingly, plaintiff’s assignment of error is overruled.

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## VI

[6] Last, plaintiff argues that the Commission abused its discretion by failing to find that plaintiff needs life care planning as a necessary medical treatment. We disagree.

Under North Carolina General Statutes, section 97-25,

In case of a controversy arising between the employer and employee relative to the continuance of medical, surgical, hospital, or other treatment, the Industrial Commission may order such further treatments as may in the discretion of the Commission be necessary.

The Commission may at any time upon the request of an employee order a change of treatment and designate other treatment suggested by the injured employee subject to the approval of the Commission . . . .

N.C. Gen. Stat. § 97-25 (2007).

The determination of what treatment is appropriate for a particular employee is a matter within the exclusive jurisdiction of the Full Commission. The Full Commission is not required to make exhaustive findings as to each statement made by any given witness or make findings rejecting specific evidence. The factual findings are sufficient so long as this Court can reasonably infer that the Full Commission gave proper consideration to all relevant testimony.

*Scarboro v. Emery Worldwide Freight Corp.*, — N.C. App. —, —, 665 S.E.2d 781, 785 (2008) (internal citations, quotations, and brackets omitted).

Here, during his deposition, Dr. Bartko testified as follows:

Counsel: If we were seeking to determine [plaintiff's] needs in terms of her future demands or needs for assistance in the future, both physically, psychologically, and from a safety standpoint, would it be appropriate to have an evaluation by a lifecare planner of all of those needs?

Bartko: Yes.

Counsel: Would you be willing to make that recommendation?

Bartko: Sure.

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The Commission made the following findings of fact:

18. At Dr. Bartko's deposition, Plaintiff's counsel asked whether Dr. Bartko would recommend an evaluation by a life care planner if the parties were seeking to determine her future needs for assistance. Dr. Bartko responded that he would.

...

20. The Full Commission finds that there was insufficient evidence to establish that the development of a life care plan is necessary in this case or that Defendants should be ordered to provide one for Plaintiff.

From these findings, we can reasonably infer that the Commission gave proper consideration to Dr. Bartko's testimony regarding life care planning; therefore, the Commission's findings of fact with regard to life care planning for plaintiff are deemed sufficient. Accordingly, plaintiff's assignments of error are overruled.

Affirmed in part; dismissed in part.

Judges WYNN and McGEE concur.

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STATE OF NORTH CAROLINA v. DONALD KEVIN WASHBURN, DEFENDANT

No. COA09-72

(Filed 17 November 2009)

**Search and Seizure— motion to suppress drugs—narcotics dog—hallway outside storage unit**

The trial court did not err in a controlled substances case by denying defendant's motion to suppress evidence obtained from searches of his home and storage unit. The police were lawfully present in the common hallway outside the storage unit with a narcotics dog, and there was probable cause for a search warrant for his house based on the search of the storage unit and the statements of an informant.

Appeal by defendant from judgments entered 17 September 2008 by Judge William Z. Wood, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 31 August 2009.

## STATE v. WASHBURN

[201 N.C. App. 93 (2009)]

*Roy Cooper, Attorney General, by Grady L. Balentine, Jr.,  
Special Deputy Attorney General, for the State.*

*A. Wayne Harrison, for defendant.*

MARTIN, Chief Judge.

Defendant was indicted on charges of felony possession of cocaine pursuant to N.C.G.S. § 90-95(d)(3), possession of drug paraphernalia pursuant to N.C.G.S. § 90-113.22, maintaining a dwelling for keeping or selling controlled substances pursuant to N.C.G.S. § 90-108(a)(7), maintaining a storage unit or a building to keep or sell controlled substances pursuant to N.C.G.S. § 90-108(a)(7), possession with intent to manufacture, sell, or deliver cocaine pursuant to N.C.G.S. § 90-95(a)(1), possession with intent to sell or deliver Dihydrocodeinone pursuant to N.C.G.S. § 90-95(a)(1), trafficking in opium-possession pursuant to N.C.G.S. § 90-95(h)(4), and resisting a public officer pursuant to N.C.G.S. § 14-223. He moved to suppress evidence seized from searches of a rented storage unit and from his residence.

The evidence at the suppression hearing tended to show that on 18 September 2006, Line Sergeant R.K. Smith (“Sergeant Smith”) of the Kernersville Police Department received a tip from an informant who had been providing accurate information to him for thirteen years. The informant told Sergeant Smith that defendant kept a large quantity of drugs in a blue toolbox in his garage and rented a climate-controlled storage unit somewhere within the Kernersville town limits. In addition, the informant told Sergeant Smith defendant’s name and address, the model and color of defendant’s truck, and defendant’s license plate number. Sergeant Smith relayed this information to the Kernersville Police Department’s Vice and Narcotics Unit. Officer A.B. Cox (“Officer Cox”), a detective with the unit, received the information and contacted Sergeant Smith for more details.

With this information, Officer Cox began an investigation of defendant’s activities, conducting surveillance several times at 4612 Clipstone Lane in Kernersville, North Carolina, the address supplied by the informant, and visiting Shields Road Self-Storage (“storage facility”), the only climate-controlled storage facility in town at that time. He confirmed defendant lived at the address supplied by the informant after finding mail addressed to defendant in garbage collected by the Department of Public Works. In addition, Officer Cox confirmed the informant’s information regarding defendant’s truck,

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the presence of a blue toolbox in defendant's garage, and defendant's rental of a storage unit at the storage facility.

In the course of his investigation, on 26 October 2006, Officer Cox requested that Detective Kevin Clodfelter ("Detective Clodfelter") of the Kernersville Police Department's Narcotics Unit perform a random sweep of the storage facility with a dog trained in drug detection. After receiving permission from the manager of the facility, Ben Mastin ("Mr. Mastin"), to enter the facility and search with a K-9 unit, Detective Clodfelter began the search. Detective Clodfelter was not provided any information as to which specific unit was the potential storage unit at issue. Once inside the hallway of the building containing defendant's individual unit, the dog indicated the presence of contraband by alerting on the door of unit 4078-C, defendant's unit.

Detective Clodfelter then left to obtain a search warrant for the unit, and upon his return with the warrant, the lock to defendant's unit was drilled off and the officers entered. Inside the unit, the officers discovered, *inter alia*, drug paraphernalia, a residue of white powder on the floor, and \$5,100 in one-hundred-dollar bills. Officer Cox conducted a field test on the white powder, which tested positive for the presence of cocaine. The officers then seized the items found in the storage unit.

After obtaining a warrant based on the evidence seized from the storage unit and information provided by the informant, Officer Cox, accompanied by Detective Clodfelter and Detective Hess, arrived at defendant's 4612 Clipstone Lane residence. Having knocked on defendant's door and receiving no response, the officers entered the residence and found defendant hiding in the attic. The officers then searched defendant's home in accordance with the search warrant.

At the conclusion of the evidence, the trial court denied defendant's motion based on its findings that the hallway outside defendant's storage unit was a public area, the warrants to search the individual unit and residence were properly obtained, and the discovery of drugs in the storage unit combined with other pertinent facts was enough to connect his residence with the possibility of drugs being sold.

Defendant subsequently pled guilty to felony possession of cocaine, possession of drug paraphernalia, maintaining a dwelling for keeping or selling controlled substances, maintaining a storage unit or a building to keep or sell controlled substances, possession with intent to manufacture, sell, or deliver cocaine, and resisting a public

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officer. The charges of possession with intent to manufacture, sell, or deliver Dihydrocodeinone and trafficking in opium-possession were dropped. Having properly retained his right to appeal the denial of his motion to suppress, defendant now appeals from the order denying the motion to suppress. We affirm.

In defendant's sole argument before this Court, he contends the trial court erred in denying the motion to suppress evidence obtained from all searches and seizures conducted by the Kernersville Police Department. We disagree.

When analyzing a trial court's denial of a motion to suppress, the scope of review is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Bone*, 354 N.C. 1, 7, 550 S.E.2d 482, 486 (2001) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)), *cert. denied*, 535 U.S. 940, 152 L. Ed. 2d 231 (2002). When a defendant has not assigned error to any of the trial court's findings of fact, those findings are conclusive and binding on appeal. *State v. Jacobs*, 162 N.C. App. 251, 254, 590 S.E.2d 437, 440 (2004). "The trial court's conclusions of law, however, are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

Defendant initially contends that the dog sniff of the hallway outside of his locked storage unit constitutes an illegal warrantless search because he had a reasonable expectation of privacy in the storage facility, including the hallway area. We disagree.

The first clause of the Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. "[T]he touchstone of the Fourth Amendment analysis has been whether a person has a constitutionally protected reasonable expectation of privacy." *State v. Phillips*, 132 N.C. App. 765, 770, 513 S.E.2d 568, 572 (internal quotation marks omitted), *disc. review denied and appeal dismissed*, 350 N.C. 846, 539 S.E.2d 3 (1999). Such an unreasonable search "occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v. Jacobsen*, 466 U.S. 109, 113, 80 L. Ed. 2d 85, 94 (1984).

Official conduct that does not compromise any legitimate interest in privacy is not a search subject to the Fourth Amendment. *Id.* at 123, 80 L. Ed. 2d at 101. Any interest in possessing contraband cannot

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be deemed legitimate, and thus, governmental conduct that only reveals the possession of contraband does not compromise any legitimate privacy interest. *Id.* at 121-23, 80 L. Ed. 2d at 99-101.

The United States Supreme Court discussed the Fourth Amendment implications of a canine sniff in *United States v. Place*, 462 U.S. 696, 77 L. Ed. 2d 110 (1983). There, the Court treated the sniff of a well-trained narcotics dog as *sui generis* because the sniff “disclose[d] only the presence or absence of narcotics, a contraband item.” *Id.* at 707, 77 L. Ed. 2d at 121. As the United States Supreme Court explained in *Illinois v. Caballes*, since there is no legitimate interest in possessing contraband, a police officer’s use of a well-trained narcotics dog that reveals only the possession of narcotics does not compromise any legitimate privacy interest and does not violate the Fourth Amendment. 543 U.S. 405, 408-09, 160 L. Ed. 2d 842, 847 (2005).

In the present case, the officers’ use of the dog to sweep the common area of a storage facility, alerting them to the presence of contraband in defendant’s storage unit, did not infringe upon defendant’s Fourth Amendment rights. As defendant had no legitimate interest in possessing contraband, there has been no legitimate privacy interest compromised which the Fourth Amendment seeks to protect. *Id.* Therefore, the question before this Court is whether the police were lawfully present in the hallway area of the storage facility in order to permit the dog sniff. *See United States v. Brock*, 417 F.3d 692, 697 (7th Cir. 2005); *United States v. Roby*, 122 F.3d 1120, 1124-25 (8th Cir. 1997); *United States v. Venema*, 563 F.2d 1003, 1005 (10th Cir. 1977).

It is well-settled that when a third party with common authority over a home or other protected area consents to a search, the need for a search warrant is obviated. *Georgia v. Randolph*, 547 U.S. 103, 106, 164 L. Ed. 2d 208, 217 (2006) (citing *Illinois v. Rodriguez*, 497 U.S. 177, 111 L. E. 2d 148 (1990); *United States v. Matlock*, 415 U.S. 164, 39 L. Ed. 2d 242 (1974)). In *United States v. Brock*, the officers were granted consent to search the common areas of a residence by a resident with common authority over that area. 417 F.3d at 697. Because of this consent, the entry of the dog into that common space did not infringe on the other roommate’s legitimate expectation of privacy. *Id.* The Court reasoned that consent granted by a third-party to search shared property is based on a “reduced expectation of privacy in the premises or things shared with another.” *Id.* (internal quotation marks omitted). “When someone shares an apartment or a home with another individual, he ordinarily assumes the risk that a

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co-tenant might consent to a search, at least to all common areas and those areas to which the other has access.” *Id.* (internal quotation marks omitted).

The Eighth Circuit has also concluded that the use of a dog sniff in a common area is not a search. *Roby*, 122 F.3d at 1124-25. There, the Court considered whether a canine sniff in the common corridor of a hotel intrudes upon a legitimate expectation of privacy. *Id.* at 1124. The Court determined that, although there is a reasonable expectation of privacy in one’s hotel room, a privacy expectation does not extend to the corridor outside the hotel room as that area is traversed by many people. *Id.* at 1125. The Court also noted that the fact that a dog is more skilled at odor detection than a human does not render the sniff illegal. *Id.* at 1124-25.

Similarly, in *United States v. Venema*, the Tenth Circuit held that the dog sniff of the areaway in front of the defendant’s rented storage locker did not constitute a search. 563 F.2d at 1005-06. There, the Court reasoned that, while the area inside the locker itself was private, the area in front of the locker was semi-public in nature. *Id.* at 1005. Since the officers brought the dog on the premises with the owner of the storage company’s consent, they were there lawfully, and did not implicate the Fourth Amendment. *Id.* at 1005-06.

In the present case, the facts are substantially similar to the cases cited above. The police officers were lawfully present in the common hallway outside defendant’s individual storage unit. The storage facility, in which renters obtain access into the gated facility by way of a personalized access code, consists of several buildings divided into four or five sections, with each section containing fifteen units. The doors to the individual units line hallways inside the various buildings, and the individual units are secured by the individual renters’ locks. The hallway at issue, as with all of the common areas in the facility, was open to every person who had an access code and any invited guests. The police department also had its own access code to the storage facility, which had previously been supplied to it by a person with common authority over the building, the facility manager, Mr. Mastin. On the particular day at issue, Officer Cox and Detective Clodfelter obtained additional permission to access the common areas with a drug dog from Mr. Mastin.

Because this hallway area was open to any individual who rented a storage unit, facility management, guests of renters, and representatives from the police department, it was a common area and de-

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defendant could not possibly have possessed a reasonable expectation in the hallway area. Thus, with Mr. Mastin's consent, the officer's were lawfully present in the hallway. Since the police were lawfully present in the common hallway, the use of the drug dog in that area did not infringe on defendant's legitimate privacy interests. Accordingly, a search warrant for the hallway area was not needed.

Defendant argues this case requires a different result and relies on the Second Circuit's decision in *United States v. Thomas*, 757 F.2d 1359 (2d Cir. 1985). There, the Court rejected the notion that "a sniff can never be a search." *Id.* at 1366. Basing its decision on the "heightened privacy interest that an individual has in his dwelling place," *id.*, the Second Circuit reasoned that "the defendant had a legitimate expectation that the contents of his closed apartment would remain private, that they could not be 'sensed' from outside his door. Use of the trained dog impermissibly intruded on that legitimate expectation." *Id.* at 1367.

*Thomas*, however, is criticized in that its proposition "conflicts with the Supreme Court's determination that [n]o legitimate expectation of privacy is impinged by governmental conduct that can reveal nothing about noncontraband items." *United States v. Lingenfelter*, 997 F.2d 632, 638 (9th Cir. 1993) (internal quotation marks omitted). We join the Ninth Circuit's reasoning and hold that defendant had no expectation of privacy in the common hallway of the storage facility, making the dog sniff permissible within the confines of the Fourth Amendment.

In addition, defendant contends the police did not have probable cause or reasonable suspicion to believe contraband was contained in his storage unit before deciding to access the adjoining hallway with a drug dog, thus making the subsequent actions illegal under the Fourth Amendment. We disagree. As we have already determined that the dog sniff was not a Fourth Amendment search, probable cause was not a prerequisite for the entry. *See United States v. Whitehead*, 849 F.2d 849, 855 (4th Cir. 1988) (holding that police were not required to have probable cause before bringing trained dogs into passenger train sleeping compartment to sniff for narcotics). Therefore, defendant's contention fails.

Defendant next argues that because the dog sniff was a violation of his Fourth Amendment rights, the subsequent search warrant of the individual storage unit and the evidence obtained therefrom were invalid. We disagree.

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As discussed above, the drug dog was lawfully present in the storage facility, and the information obtained from its sweep was valid. In addition, a positive alert for drugs by a specially trained drug dog gives probable cause to search the area or item where the dog alerts. *See United States v. Jeffus*, 22 F.3d 554, 557 (4th Cir. 1994). As such, the drug dog's alert in the present case provided the requisite probable cause to search defendant's storage unit. Thus, the search warrant for the storage unit was valid and the evidence procured from the subsequent search was properly within the police's possession. Accordingly, defendant's argument to the contrary fails.

Lastly, defendant contends that, even if the evidence from his storage facility was properly obtained, there was no nexus between the presence of drugs in the storage unit and the existence of drugs at his house to provide the requisite probable cause for the search warrant of his residence. Again, we disagree.

The general rule, pursuant to the Fourth Amendment of the United States Constitution and Article I, Section 20 of the North Carolina Constitution, is that issuance of a warrant based upon probable cause is required for a valid search warrant. *See State v. Jones*, 96 N.C. App. 389, 397, 386 S.E.2d 217, 222 (1989), *appeal dismissed and review denied*, 326 N.C. 366, 389 S.E.2d 809 (1990). An application for a search warrant must contain a statement supported by allegations of fact that there is probable cause to believe items subject to seizure may be found on the premises sought to be searched. *See* N.C. Gen. Stat. § 15A-244 (2007). Under the "totality of the circumstances" standard adopted by our Supreme Court for determining the existence of probable cause:

[t]he task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing] that probable cause existed."

*State v. Arrington*, 311 N.C. 633, 638, 319 S.E.2d 254, 257-58 (1984) (quoting *Illinois v. Gates*, 462 U.S. 213, 238-39, 76 L. Ed. 2d 527, 548 (1983)).

When the application is based upon information provided by an informant, the affidavit should state circumstances supporting the

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informant's reliability and basis for the belief that a search will find the items sought. *State v. Crawford*, 104 N.C. App. 591, 596, 410 S.E.2d 499, 501 (1991). A showing is not required "that such a belief be correct or more likely true than false. A practical, nontechnical probability is all that is required." *State v. Zuniga*, 312 N.C. 251, 262, 322 S.E.2d 140, 146 (1984). Further, a magistrate's determination of probable cause should be given great deference, and an "after-the-fact scrutiny should not take the form of a *de novo* review." *Arrington*, 311 N.C. at 638, 319 S.E.2d at 258.

In addition, this Court has held that "firsthand information" of contraband seen in one location will support a search of a second location. *State v. McCoy*, 100 N.C. App. 574, 577-78, 397 S.E.2d 355, 357-58 (1990) (citing *State v. Mavrogianis*, 57 N.C. App. 178, 291 S.E.2d 163, *disc. review denied*, 306 N.C. 562, 294 S.E.2d 227 (1982)). However, evidence obtained in one location cannot provide probable cause for the search of another location when the evidence offered does not "implicate the premises to be searched." *State v. Goforth*, 65 N.C. App. 302, 308, 309 S.E.2d 488, 493 (1983) (holding that conclusory statements in the supporting affidavit that two people were going to a certain location to buy drugs and evidence that these two individuals in fact went to that location was insufficient to implicate the premises and therefore provide probable cause to search that residence); *see also State v. Campbell*, 282 N.C. 125, 131, 191 S.E.2d 752, 756-57 (1972) (holding that statements that defendants sold drugs in other parts of town and lived in the residence to be searched did not implicate the residence as a place where drugs would likely be found and therefore there was no probable cause for a search warrant of that residence).

In the present case, there was sufficient evidence offered in support of the search warrant for defendant's residence to provide probable cause to believe that contraband would be found in that location. First of all, Officer Cox, in his affidavit, offered proof of illegal drugs, which we have already determined were lawfully seized, found in defendant's storage unit. In addition, Officer Cox provided statements made by an informant that defendant stored additional drugs in a blue tool box at his residence. Assuming the informant is reliable and provides a basis for his belief that illegal drugs would be found, *see Crawford*, 104 N.C. App. at 596, 410 S.E.2d at 501, his testimony, taken in conjunction with the evidence seized from the storage unit, sufficiently implicates defendant's residence as one where contraband would likely be discovered, providing ample probable cause.

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Thus, the only issue left for this Court to address is the informant's reliability and basis for his belief. *Id.*

Though it is true that an informant's statements cannot blindly provide probable cause for a search warrant, there is no reason, given the circumstances in this case, to doubt this informant's reliability and basis of knowledge. *See id.* at 595-96, 410 S.E.2d at 501-02. First of all, the informant's reliability is clearly supported by facts established in Officer Cox's affidavit. Specifically, the affidavit established that Sergeant Smith spoke with a source from whom he had been receiving accurate information for nearly thirteen years. As in *Illinois v. Gates*, where the letter received from the informant was referred to another officer to pursue the information, 462 U.S. at 225, 76 L. E. 2d at 540, Sergeant Smith referred the tip to the narcotics unit for Officer Cox to conduct the investigation. One notable difference, however, is that in *Gates* the source was anonymous, *id.*, whereas the informant here had been a trusted source of Sergeant Smith's for many years. So while the source may have initially been unknown to Officer Cox, Sergeant Smith believed him to be reliable based on past experiences. Thus, the informant's reliability is clearly evident.

In addition, the affidavit indicates the informant's basis of knowledge. In the present case, the informant told Sergeant Smith that defendant's name was Kevin Washburn, he lived at 4612 Clipstone Lane, drove a white-over-tan Ford pick-up truck with license plate number XL-2269, kept a large quantity of drugs in a blue toolbox in his garage, and had a climate-controlled storage unit. The informant had attained this information by way of a female waitress at Zoe's Restaurant who had been involved with defendant. Sergeant Smith referred this information to Officer Cox who investigated it. Officer Cox went to the Clipstone Lane address, saw the truck and license plate informant had provided, and confirmed that the vehicle belonged to defendant. Officer Cox returned to the residence on several more occasions to conduct surveillance, and on one of those occasions saw a blue toolbox in the corner of the garage. He was eventually able to confirm this location as defendant's address through mail found in the garbage collected outside the residence. He also confirmed that defendant rented a storage unit at Shields Road Self-Storage. Officer Cox later spoke with the informant himself, who reiterated the information previously given to Sergeant Smith. Given the investigation Officer Cox conducted and his ability to confirm the information the informant provided, the informant's basis and veracity of knowledge is established. Therefore, the totality of the circumstances standard set forth by *Gates* is satisfied.

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Accordingly, based on the evidence obtained from the search of defendant's storage unit and the valid statement provided by the informant that drugs were contained in defendant's blue tool box, there was a substantial basis for the magistrate to conclude there was probable cause to believe drugs would be found in defendant's residence. The search warrant of defendant's home is therefore valid and defendant's assignment of error is dismissed.

Thus, we affirm the trial court's denial of defendant's motion to suppress the evidence obtained from both his individual storage unit and his residence.

Affirmed.

Judges HUNTER and BRYANT concur.

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STATE OF NORTH CAROLINA v. EDDIE JAMES WILLIAMS, III

No. COA08-1580

(Filed 17 November 2009)

**1. Criminal Law— prosecutor's closing argument—state-  
ments about defendant**

The trial court did not err by failing to intervene in the State's closing argument where defendant contended that the State had encouraged the jury to convict on an impermissible basis, but in fact mischaracterized the State's argument.

**2. Identification of Defendants— show-up—private citizen  
initiating**

The trial court did not err in a prosecution for burglary and related charges by admitting identification testimony from a "show-up" where a friend acting as a private citizen called the witness to see defendant.

**3. Identification of Defendants— photographic line-up—  
defendant acquitted**

A photographic line-up was not too suggestive where defendant was acquitted of the only charge related to the evidence.

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**4. Robbery— armed—lesser—included offense—instruction not given—no evidence that gun inoperable**—The trial court did not err by failing to instruct the jury on the lesser-included offense of common-law robbery in a prosecution for robbery with a dangerous weapon where there was testimony that a piece of the gun fell off during the robbery. Defendant did not produce any evidence that the gun was rendered inoperable.

**5. Burglary and Unlawful Breaking or Entering— motion to dismiss—evidence sufficient**

The trial court did not err in a prosecution for first-degree burglary and related offenses by denying defendant's motion to dismiss for insufficient evidence at the close of all the evidence.

**6. Sentencing— consecutive terms of imprisonment—no abuse of discretion**

The trial court did not abuse its discretion by sentencing defendant to consecutive terms in prison where defendant committed armed robbery or attempted armed robbery on four separate occasions and threatened the lives of numerous people.

Appeal by Defendant from judgment entered 8 May 2008 by Judge Paul G. Gessner in Guilford County Superior Court. Heard in the Court of Appeals 18 August 2009.

*Attorney General Roy A. Cooper, by Assistant Attorney General W. Wallace Finlator, Jr., for the State.*

*Hartsell & Williams, P.A., by Christy E. Wilhelm, for Defendant.*

BEASLEY, Judge.

Eddie James Williams (Defendant) appeals from judgment entered on his convictions of three charges of first-degree burglary, seven charges of robbery with a dangerous weapon, and eleven charges of attempted robbery with a dangerous weapon. For the reasons stated below, we find no error.

Defendant was arrested on 22 February 2007 and charged with twenty-five charges of first-degree burglary, robbery with a dangerous weapon, and attempted robbery with a dangerous weapon. Defendant was tried before a Guilford County jury in May 2008.

Defendant broke into numerous residences armed with a gun, in an attempt to steal the residents' personal property. The State's wit-

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nesses testified regarding five separate incidents, occurring between October 2006 and February 2007, that gave rise to the charges against Defendant.

Defendant offered no evidence. In May 2008, a jury found Defendant guilty on twenty-two charges based on offenses committed between October 2006 and February 2007. The jury returned verdicts of not guilty on charges based on alleged offenses committed 3 October 2006. Defendant was convicted of four charges of first-degree burglary, seven charges of robbery with a dangerous weapon, and eleven charges of attempted robbery with a dangerous weapon. Defendant was sentenced to eight consecutive sentences of seventy-five to ninety-nine months imprisonment, two seventy-five to ninety-nine month consecutive sentences for each of the four instances. From this judgment and sentence, Defendant appeals.

**CLOSING ARGUMENT**

[1] Defendant argues that the trial court erred by failing to intervene during the State's closing argument, which Defendant contends improperly encouraged the jury to convict Defendant on an impermissible basis. Defendant asserts that the State argued that Defendant "hated Latino people and targeted them because they did not speak English[,] was practically a murderer[,] and did not deserve the presumption of innocence afforded to him by our Constitution." We disagree.

Because Defendant failed to object in a timely fashion, "[t]he standard of review for assessing alleged improper argument . . . is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002). This Court must determine:

whether the argument in question strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord and: (1) precluded other similar remarks from the offending attorney; and/or (2) instructed the jury to disregard the improper comments already made.

*Id.* A proper closing argument must, "(1) be devoid of counsel's personal opinion; (2) avoid name-calling and/or references to matters beyond the record; (3) be premised on logical deductions, not on

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appeals to passion or prejudice; and (4) be constructed from fair inferences drawn only from evidence properly admitted at trial.” *Id.* at 135, 558 S.E.2d at 108.

The State’s closing argument, in pertinent part, included the following:

Now, the defendant here during the course of his conduct over these periods of months made several miscalculations that are going to cost him. Number one, he believed that because the victims were Hispanic, that they would have substantial amounts of money on their person and therefore he could rob them easily and walk away with a bank load. . . . All the terror he caused, all the crime he committed, all he got was a few hundred bucks total.

Number two, he assumed that since they were from a foreign country, that once he did rob these people and treated them any way he felt like doing it, that they wouldn’t report it; and if they did report it, they wouldn’t follow up with the police. And he miscalculated that.

And, finally, his assumption was that if they did report it 14 months later they wouldn’t come to court and testify against him, and they did that. And they were good, honest, believable people.

And all of us, when we heard the facts in this case, were probably sitting there wondering what kind of person would do these things, what kind of a mean, selfish person would commit these crimes? And after hearing the evidence, if you want to know what kind of person would do this, all you got to do is look right over here. There he sits. That’s the kind of person that would commit these crimes.

. . . .

I want you to remember one thing; and that is, he ought to thank his lucky stars every day that he’s not sitting over here looking at the death penalty jury, because had that gun discharged and hit one of those victims or gone through that wall and hit that child, this would be a completely different situation. No matter what happens to him today is his lucky day.

. . . .

And when you go back in that jury room here after [Defendant’s counsel] gives his argument to you, this defendant has got the presumption of innocence. Every defendant does. And the first

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thing I want you to do when you go back in that jury room is strip him of the presumption of innocence because he has lost it.

Defendant's argument mis-characterizes this portion of the State's closing argument. First, the State did not argue that Defendant "hated Latino people and targeted them because they did not speak English." Defendant correctly summarizes the State's statements that he believed his victims might be more likely to carry cash and less likely to report him since they were Hispanic. Secondly, Defendant argues that the State argued that Defendant "was practically a murderer." We reject this argument, and conclude that the State's argument was a fair inference from the evidence presented that all of the victims were indeed Hispanic and that Defendant's actions could have had a more serious result. Defendant also contends that the State argued that Defendant "did not deserve the presumption of innocence afforded to him by our Constitution." Rather, the State argued that Defendant, along with every other defendant, should have the presumption of innocence. The State went on to argue further that the jury should find that the evidence presented outweighed the presumption of innocence. We conclude that the State's closing argument was proper and the trial court did not err by failing to intervene on its own accord. This assignment of error is overruled.

"SHOW-UP"

[2] Defendant argues that the trial court erred by admitting testimony regarding an improper identification procedure known as a "show-up." Defendant contends that by "allowing testimony that [Erika Cruz Rodriguez (Cruz)] had positively identified [Defendant] while he was being arrested . . . , the trial court [had] allowed the State to bolster the credibility of [Cruz] with an improper procedure[.]" We disagree.

Detective V.A. Whitley, of the Greensboro Police Department, testified that in April 2007, he met with Caravantes in order to show her a photographic lineup of possible suspects of her 3 October 2006 robbery. After speaking with Cruz, Detective Whitley discovered that she had previously seen Defendant the night he was arrested. Because Cruz had viewed Defendant since the 3 October 2006 robbery, Detective Whitley testified that he "thought that [it] would prejudice the lineup procedure, so [he] did not show [Cruz] the photographic lineup." Cruz testified that her friend, and no one from the police department, had called her to view Defendant on that previous occasion.

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A “show-up” is a procedure “whereby a suspect is shown singularly to a witness or witnesses for the purposes of identification.” *State v. Harrison*, 169 N.C. App. 257, 262, 610 S.E.2d 407, 412 (2005). A “show-up” is an often-criticized practice because it “may be inherently suggestive for the reason that witnesses would be likely to assume that the police presented for their view persons who were suspected of being guilty of the offense under investigation.” *Id.*

Defendant argues that the use of improper identification procedures violates his rights under the United States and North Carolina Constitution. “The exclusionary rule . . . excludes from a criminal trial *any* evidence . . . in violation of [a defendant’s] Fourth Amendment rights.” *State v. Miller*, 282 N.C. 633, 641, 194 S.E.2d 353, 358 (1973) (quotation omitted). However, “[t]he protections of the fourth amendment and the attendant exclusionary rule have traditionally been confined to governmental rather than private action.” *State v. Keadle*, 51 N.C. App. 660, 662, 277 S.E.2d 456, 458 (1981). In the instant case, it was a friend who called Cruz to see Defendant. Cruz’s friend “was not acting as an agent of the government and instead was acting as a private citizen. . . . [A]s a private actor, the Fourth Amendment does not apply to [her] actions and would not render the evidence inadmissible.” *State v. McBennett*, 191 N.C. App. 734, 740, 664 S.E.2d 51, 56 (2008).

Accordingly, we conclude that Defendant’s argument is without merit as his arguments are not applicable to his case. This assignment of error is overruled.

IDENTIFICATION PROCEDURE

[3] Defendant contends that the trial court erred by allowing testimony regarding an improper photographic lineup given to two witnesses. Defendant argues that the identification procedure given to Ms. Caravantes and Ms. Cruz violated his due process rights because they were impermissibly suggestive. We disagree.

“Whether an identification procedure is unduly suggestive depends on the totality of the circumstances.” *State v. Rogers*, 355 N.C. 420, 432, 562 S.E.2d 859, 868 (2002) (citation omitted). Under a due process analysis, “‘[f]irst, the Court must determine whether the identification procedures were [so] impermissibly suggestive.’” *Id.* (quoting *State v. Pigott*, 320 N.C. 96, 99, 357 S.E.2d 631, 633 (1987)). If this Court determines that this is the case, we “must then determine whether the [suggestive] procedures created a substantial likelihood of irreparable misidentification.” *Id.*

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Defendant argues that the photographic lineup used with two witnesses to identify him was “unnecessarily suggestive,” “conducive to irreparable mistaken identification,” and “offend[ed] fundamental standards of decency, fairness and justice.” V.A. Whitley, a detective for the Greensboro Police Department, testified that he presented a photographic lineup of possible suspects to Ms. Caravantes and Ms. Cruz for them to identify the perpetrator of their robberies on 3 October 2006. This evidence was submitted to the jury, in relation only to the 3 October 2006 charges, upon which Defendant was acquitted.

Defendant’s contention that the evidence resulted in prejudicial error affecting his constitutional rights is without merit. “[D]efendant cannot show that he was prejudiced by this evidence when he was acquitted of [all] charges to which [Whitley’s] testimony related.” *State v. Ford*, 314 N.C. 498, 504, 334 S.E.2d 765, 769 (1985). Any impact that this evidence might have had did not prevent Defendant from having a fair trial or prejudice him in any way. This assignment of error is overruled.

**JURY INSTRUCTIONS**

**[4]** Defendant argues that the trial court erred in denying his request to include the potential verdicts and lesser-included offenses of common law robbery and attempted common law robbery in his jury instructions. We find no error.

“[A] lesser included offense instruction is required if the evidence would permit a jury rationally to find [defendant] guilty of the lesser offense and acquit him of the greater.” *State v. Dyson*, 165 N.C. App. 648, 654, 599 S.E.2d 73, 77 (2004) (internal quotation omitted). We must determine whether:

there is the presence, or absence, of any evidence in the record which might convince a rational trier of fact to convict the defendant of a less grievous offense. Where the State’s evidence is positive as to each element of the offense charged and there is no contradictory evidence relating to any element, no instruction on a lesser included offense is required.

*Id.* (internal quotations omitted). “Where there is positive and unequivocal evidence as to each and every element of armed robbery, and there is no evidence supporting the defendant’s guilt of a lesser included offense, the trial court may properly decline to instruct the

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jury on the lesser included offense of common law robbery.” *State v. Frazier*, 150 N.C. App. 416, 418, 562 S.E.2d 910, 912-13 (2002).

The offense of robbery with a firearm or other dangerous weapons is set forth in N.C. Gen. Stat. § 14-87(a) (2007) as the following:

[a]ny person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another . . . or any other place where there is a person or persons in attendance, at any time, either day or night . . . shall be guilty of a Class D felony.

N.C. Gen. Stat. § 14-87(a) (2007). “The primary distinction between armed robbery and common law robbery is that ‘the former is accomplished by the use or threatened use of a dangerous weapon whereby the life of a person is endangered or threatened.’ [This defining factor] is not an essential element of common law robbery.” *Frazier*, 150 N.C. App. at 419, 562 S.E.2d at 912.

Defendant argues that there was some testimony that Defendant had what “appeared to be a malfunctioning firearm,” that there was a question of fact as to whether Defendant’s gun was an operational firearm. We disagree and conclude that there was positive and unequivocal evidence to each and every element of armed robbery.

“ ‘When a person perpetrates a robbery by brandishing an instrument which appears to be a firearm . . . in the absence of any evidence to the contrary, the law will presume the instrument to be what his conduct represents it to be—a firearm or other dangerous weapon.’ ” *State v. Allen*, 317 N.C. 119, 123, 343 S.E.2d 893, 896 (1986) (quoting *State v. Thompson*, 297 N.C. 285, 289, 254 S.E.2d 526, 528 (1979)) (citation omitted). “[W]here there is evidence that a defendant has committed a robbery with what appears to the victim to be a firearm or other dangerous weapon and nothing to the contrary appears in the evidence, the presumption that the victim’s life was endangered or threatened is mandatory.” *State v. Lee*, 128 N.C. App. 506, 510, 495 S.E.2d 373, 375 (1998) (quoting *State v. Williams*, 335 N.C. 518, 521, 438 S.E.2d 727, 728 (1994)). However, if there is evidence “that the instrument is ‘an inoperative firearm incapable of threatening or endangering the life of the victim[,]’ it is ‘for the jury to

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determine the nature of the weapon.’ ” *Frazier*, 150 N.C. App. at 419, 562 S.E.2d at 913 (quoting *Allen*, 317 N.C. at 125-26, 343 S.E.2d at 897).

Defendant premises his argument on part of the testimony of a witness for the 3 December 2006 offense. This witness testified that a part of Defendant’s gun fell to the floor during a robbery. However, the witness also testified that immediately after a piece of the gun fell off, Defendant retrieved it and attached it.

In each offense, Defendant used his gun to “endanger or threaten the life of a person” in order to take personal property from him or her. *State v. Thomas*, 85 N.C. App. 319, 321, 354 S.E.2d 891, 893 (1987). Defendant did not offer any evidence supporting the contention that the gun was not functional. More importantly, Defendant did not produce any evidence that the gun he used was rendered inoperable even if a piece did fall off. Therefore, the trial court did not err in refusing to instruct the jury on the lesser-included offense of common law robbery. This assignment of error is overruled.

MOTION TO DISMISS

[5] Defendant argues that the trial court erred by denying his motion to dismiss at the close of all the evidence because there was insufficient evidence of the charges against him. We disagree.

“The denial of a motion to dismiss for insufficient evidence is a question of law, which this Court reviews *de novo*.” *State v. Bagley*, — N.C. App. —, 644 S.E.2d 615, 621 (2007) (internal citations omitted). The appropriate standard of review for a motion to dismiss by defendant in a criminal trial is “ ‘whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant’s being the perpetrator of such offense. If so, the motion is properly denied.’ ” *State v. Blizzard*, 169 N.C. App. 285, 289, 610 S.E.2d 245, 249 (2005) (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)). The evidence must be viewed in the “light most favorable to the State, giving the State the benefit of all reasonable inferences.” *State v. Scott*, 356 N.C. 591, 596, 573 S.E.2d 866, 869 (2002) (internal quotations and citations omitted). “Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion.” *Id.* at 597, 573 S.E.2d at 869.

Defendant contends that because there was “no evidence . . . presented that the item used during the alleged crimes was a firearm, and whether or not it was a working, viable firearm[.]” his motion to

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dismiss should have been granted. As we previously addressed, we concluded that Defendant used a firearm, endangering and threatening the lives of his victims, in order to take their personal property.

Defendant also argues that the admission of improper identification procedures relating to the 3 October 2006 offense violated his constitutional rights to due process. Because Defendant was acquitted of the 3 October charges, we necessarily reject his argument.

The trial court did not err in denying Defendant's motion to dismiss as the State produced substantial evidence of every element of his charges and proved that he was the perpetrator of these offenses. Multiple witnesses from each offense identified Defendant as the perpetrator of the robberies or attempted robberies. In regards to the 22 February 2007, because the victims held down the Defendant after the commission of the offense and until law enforcement arrived, it is undisputable that Defendant was the perpetrator of this offense. This assignment of error is overruled.

**ENTRY OF JUDGMENT**

In his next assignment of error, Defendant argues that the trial court erred in its entry of judgment where the evidence was insufficient to support the entry of a guilty verdict. In support of his argument, Defendant merely directs us to examine his previous arguments and does not advance any new arguments or authority. This assignment of error is overruled.

**SENTENCING**

[6] Defendant contends that the trial court erred in sentencing him to seven consecutive active terms of imprisonment from 75 to 99 months. Defendant argues that his punishment is excessive, disproportionate to the crimes charged, and violates his constitutional rights under the Eighth Amendment to the United States Constitution. We disagree.

"It is undisputed that the trial court has express authority under N.C.G.S. § 15A-1354(a) to impose consecutive sentences." *State v. LaPlanche*, 349 N.C. 279, 284, 507 S.E.2d 34, 37 (1998). More importantly, "[o]nly in exceedingly unusual non-capital cases will the sentences imposed be so grossly disproportionate as to violate the Eighth Amendment's proscription of cruel and unusual punishment." *Id.* (quoting *State v. Ysagui*, 309 N.C. 780, 786, 309 S.E.2d 436, 441 (1983)).

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Defendant was found guilty on eleven charges of attempted robbery with a dangerous weapon, seven charges of robbery with a dangerous weapon, and four charges of first-degree burglary. In light of the evidence that Defendant committed armed robbery or attempted armed robbery on four separate occasions, and threatened the lives of numerous people, we hold that the trial court did not abuse its discretion in sentencing Defendant to eight consecutive terms of 75 to 99 months imprisonment. This assignment of error is overruled.

For the foregoing reasons, we conclude that the Defendant had a fair trial, free from prejudicial error.

No error.

Judges WYNN and STROUD concur.

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DUPLIN COUNTY BOARD OF EDUCATION, PLAINTIFF v. DUPLIN COUNTY BOARD  
OF COUNTY COMMISSIONERS DEFENDANT

No. COA09-397

(Filed 17 November 2009)

**1. Schools and Education— amount of money for fiscal year—  
subject matter jurisdiction**

The trial court had subject matter jurisdiction over an action involving county appropriations for a school board where the board triggered a statutory process by resolving that the appropriated amount was insufficient, defendant appropriated an additional amount during the mediation that was part of that statutory process, and defendant then argued that the process must begin again. There is a clear legislative preference for speedy resolutions of school budget disputes.

**2. Constitutional Law— statute—constitutionality on face  
and as applied**

Although defendant county commissioners contended that the statute which authorized plaintiff school board's suit regarding the budget was unconstitutional on its face or as applied, defendant conceded that the decision in *Beaufort Cnty. Bd of Educ. v. Beaufort Cnty. Bd. of Comm'ns*, 363 N.C. 500, was determinative and resolved the issues in favor of plaintiff.

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**3. Schools and Education— directed verdict—sufficiency of evidence—amount to maintain school system—amount needed from county**

The trial court did not err by denying defendant county commissioner's motions for directed verdict in a school funding case. Defendant contended that plaintiff was required to present evidence of the sources of funding that were under the control of the county commissioners for maintaining a system of free public schools, but the jury was concerned only with the adequacy of the county appropriation, not with the sufficiency of funds provided by other sources.

**4. Schools and Education— sufficiency of funds—sufficiency of evidence**

*Beaufort Cnty. Bd of Educ. v. Beaufort Cnty. Bd. of Comm'ns*, 363 N.C. 500, expressly rejected the contention in this case that a judgment against the Board of Commissioners should be vacated because the school board did not present sufficient evidence that the school appropriation was not sufficient for statutory categories.

**5. Appeal and Error— jurisdiction of Court of Appeals— instruction issue not raised at trial or on appeal**

The Court of Appeals does not have the same broad remedial powers granted to the North Carolina Supreme Court, and had no jurisdictional authority to grant to appellants the same remedy granted in *Beaufort Cnty. Bd of Educ. v. Beaufort Cnty. Bd. of Comm'ns*, 363 N.C. 500.

Appeal by Defendant from judgment entered 9 October 2008 by Judge Thomas D. Haigwood in Duplin County Superior Court. Heard in the Court of Appeals 1 October 2009.

*Schwartz & Shaw, P.L.L.C., by Brian C. Shaw and Richard Schwartz, for Plaintiff-Appellee.*

*The Yarborough Law Firm, P.A., by Garris Neil Yarborough; and Wendy Sivori, for Defendant-Appellant.*

BEASLEY, Judge.

Defendant appeals from a judgment ordering appropriation of \$4,795,784.00 to the Plaintiff's local current expense fund. For reasons stated below, we affirm.

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This appeal arises from a dispute between Defendant (Duplin County Board of County Commissioners) and Plaintiff (Duplin County Board of Education) over the amount of money that Defendant appropriated to Plaintiff for the 2008-2009 Fiscal Year (FY 2009). On 28 April 2008 Plaintiff submitted its FY 2009 budget request to Defendant. On 16 June 2008 Defendant adopted a budget ordinance that appropriated to Plaintiff an amount less than its budget request. Two days later Plaintiff adopted a resolution stating that the amount appropriated to Plaintiff for local current expense and capital outlay was insufficient to support a system of free public schools in Duplin County. Plaintiff informed Defendant of its resolution and requested mediation of the budget dispute. The parties selected a mediator, who presided over a joint public meeting on 23 June 2008. The parties did not resolve their dispute at this public meeting, and conducted further mediation sessions during June and July, 2008. The mediation ended on 1 August 2008 without an agreement.

On 6 August 2008 Plaintiff filed suit against Defendant, seeking “(a) determination of the amount(s) of money needed from sources under the control of the Duplin County Board of Commissioners to maintain a system of free public schools, and (b) a judgment ordering the Board of Commissioners to appropriate such additional amount(s) to the Duplin County school administrative unit[.]” Following a jury trial in September 2008, judgment was entered awarding Plaintiff \$4,795,784.00 to its local current expense fund. From this judgment Defendant appeals.

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**[1]** Defendant argues first that the judgment should be vacated on the grounds that the trial court lacked subject matter jurisdiction over the parties’ controversy. Defendant asserts that subject matter jurisdiction was defeated “due to the sovereign immunity of the Defendant” and due to “Plaintiff’s failure to comply with the procedures of the specific statutory exemption to that immunity.”

Defendant argues elsewhere that N.C. Gen. Stat. § 115C-431 is unconstitutional on its face or as applied. However, Defendant does not dispute that N.C. Gen. Stat. § 115C-431 gives the trial court general subject matter jurisdiction over a suit to resolve a budget dispute between a county board of education and board of county commissioners. Defendant instead argues that the trial court was deprived of subject matter jurisdiction by Plaintiff’s failure to comply with the requirements of N.C. Gen. Stat. § 115C-431 (2007), which provides in pertinent part that:

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- (a) If the board of education determines that the amount of money appropriated to the local current expense fund, or the capital outlay fund, or both, by the board of county commissioners is not sufficient to support a system of free public schools, the chairman of the board of education and the chairman of the board of county commissioners shall arrange a joint meeting of the two boards to be held within seven days after the day of the county commissioners' decision on the school appropriations.

Prior to the joint meeting, the Senior Resident Superior Court Judge shall appoint a mediator unless the boards agree to jointly select a mediator. The mediator shall preside at the joint meeting and shall act as a neutral facilitator of disclosures of factual information, statements of positions and contentions, and efforts to negotiate an agreement settling the boards' differences.

At the joint meeting, the entire school budget shall be considered carefully and judiciously, and the two boards shall make a good-faith attempt to resolve the differences that have arisen between them.

- (b) If no agreement is reached at the joint meeting of the two boards, the mediator shall, at the request of either board, commence a mediation immediately or within a reasonable period of time. . . .

Unless both boards agree otherwise, or unless the boards have already resolved their dispute, the mediation shall end no later than August 1. The mediator shall have the authority to determine that an impasse exists and to discontinue the mediation. . . . If no agreement is reached, the mediator shall announce that fact to the chairs of both boards, the Senior Resident Superior Court Judge, and the public. . . .

- (c) Within five days after an announcement of no agreement by the mediator, the local board of education may file an action in the superior court division of the General Court of Justice. The court shall find the facts as to the amount of money necessary to maintain a system of free public schools, and the amount of money needed from the county to make up this total. Either board has the right to have the issues of fact tried by a jury. When a jury trial is demanded, the cause shall be set for the first succeeding term of the superior court in

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the county, and shall take precedence over all other business of the court. . . . The issue submitted to the jury shall be what amount of money is needed from sources under the control of the board of county commissioners to maintain a system of free public schools.

All findings of fact in the superior court, whether found by the judge or a jury, shall be conclusive. When the facts have been found, the court shall give judgment ordering the board of county commissioners to appropriate a sum certain to the local school administrative unit, and to levy such taxes on property as may be necessary to make up this sum when added to other revenues available for the purpose.

- (d) An appeal may be taken to the appellate division of the General Court of Justice, and notice of appeal shall be given in writing within 10 days after entry of the judgment. All papers and records relating to the case shall be considered a part of the record on appeal. . . .

Defendant directs our attention to the first sentence of § 115C-431(a), providing that “[i]f the board of education determines that the amount of money appropriated to the local current expense fund, or the capital outlay fund, or both, by the board of county commissioners is not sufficient to support a system of free public schools,” then the parties shall participate in a joint meeting and mediation sessions, in an effort to reach agreement.

Defendant concedes that, following the adoption of its 16 June 2008 budget ordinance, Plaintiff on 18 June 2008 adopted a resolution that the amount appropriated to Plaintiff for local current expense and capital outlay was insufficient to support a system of free public schools in Duplin County. It is also undisputed that Plaintiff and Defendant took part in a joint public meeting and several mediation sessions but failed to reach an agreement, and that the mediator then informed the proper parties that Defendant and Plaintiff were at an impasse. Additionally, Defendant does not dispute that Plaintiff complied with the time limits of § 115C-431(c), by filing its complaint “[w]ithin five days after an announcement of no agreement by the mediator[.]” Therefore, we conclude that Plaintiff complied with all the applicable statutory requirements.

Defendant, however, argues that, regardless of Plaintiff’s initial adherence to the statutory requirements, the trial court was stripped

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of subject matter jurisdiction by Defendant's appropriation of additional funds during the mediation sessions. The mediation sessions were conducted after Plaintiff adopted a resolution that the money provided by Defendant was insufficient, but before Plaintiff filed suit on 6 August 2008. During this time, Defendant appropriated an additional \$800,000 to Plaintiff's current expense fund, and \$1,010,203 to Plaintiff's capital outlay fund for repair and maintenance. This additional appropriation fully funded Plaintiff's budget request for capital outlay repair and maintenance expenses, but did not fully fund Plaintiff's requested current expenses fund, and did not provide any funds for Plaintiff's requested capital construction fund.

Defendant's position is that its appropriation of additional funds towards Plaintiff's requested budget rendered Plaintiff's resolution ineffective. Defendant contends that Plaintiff was required to undertake a formal reconsideration of its needs and to adopt another formal resolution that the funds appropriated were insufficient. Defendant asserts that this renewed assessment is a prerequisite to the court's jurisdiction over the parties' budget dispute. We disagree, for several reasons.

"It is axiomatic that '[w]hen the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required.'" *Harrell v. Bowen*, 362 N.C. 142, 145, 655 S.E.2d 350, 352 (2008) (quoting *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006)). In this case, § 115C-431 does not state that a school board's formal resolution, determining that county funding is insufficient, is a jurisdictional prerequisite for a later civil case. Rather, the statute plainly states that a school board's decision that the county has appropriated insufficient funds shall be followed by statutorily defined attempts to resolve the parties' budgetary dispute. If the school board and the board of commissioners fail to reach an agreement, the mediator will inform the appropriate parties. It is this determination by the mediator, establishing that the parties are at an impasse, which triggers a board's right to file suit.

It is also significant that the provisions of N.C. Gen. Stat. § 115C, Article 31, "The School Budget and Fiscal Control Act," consistently impose strict time limits on the budgetary process. *See, e.g.*, N.C. Gen. Stat. § 115C-427(b) (2007) (school board superintendent must submit requested budget to school board no later than May 1); N.C. Gen. Stat. § 115C-429(a) (2007) (school board must submit budget to county commissioners no later than May 15); N.C. Gen.

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Stat. § 115C-429(b) (2007) (county commissioners must complete action on school budget by July 1); N.C. Gen. Stat. § 431(a) (2007) (if school board determines that county funding is inadequate, joint public meeting shall be held within seven days of county's decision on school appropriations); N.C. Gen. Stat. § 115C-431(b) (2007) (mediation generally ends by August 1); N.C. Gen. Stat. § 115C-431(c) (2007) (school board must file suit within five days of mediator's announcement that the parties have reached an impasse; calendaring of a requested jury trial "shall take precedence over all other business of the court").

"This statute, read as a whole, sets forth a detailed procedure for school budget disputes to be resolved as quickly as possible." *Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs*, 188 N.C. App. 399, 408, 656 S.E.2d 296, 303 (2008), *rev'd on other grounds*, *Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs*, 363 N.C. 500, 681 S.E.2d 278 (2009). In the context of this clear preference for speedy resolution of budget disputes, we note that the interpretation of N.C. Gen. Stat. § 115C-431 urged by Defendant would permit a board of county commissioners to postpone resolution of a budget debate indefinitely, simply by continuing to appropriate additional small sums to the board of education, requiring the board of education to repeat its determination of funding inadequacy and, presumably, repeat its mediation efforts as well.

"It is well settled that 'in construing statutes courts normally adopt an interpretation which will avoid absurd or bizarre consequences, the presumption being that the legislature acted in accordance with reason and common sense and did not intend untoward results.'" *State v. Jones*, 359 N.C. 832, 837-38, 616 S.E.2d 496, 499 (2005) (*quoting State ex rel. Comm'r of Ins. v. N.C. Auto. Rate Admin. Office*, 294 N.C. 60, 68, 241 S.E.2d 324, 329 (1978)). Accordingly, "[a]n unnecessary implication arising from one [statutory] section, inconsistent with the express terms of another on the same subject, yields to the expressed intent." *Wake Cares, Inc. v. Wake Cty. Bd. of Educ.*, 363 N.C. 165, 172, 675 S.E.2d 345, 351 (2009) (*quoting Bd. of Educ. v. Bd. of Cty. Comm'rs*, 240 N.C. 118, 126, 81 S.E.2d 256, 262 (1954)).

We conclude that Plaintiff complied with the appropriate statutory requirements, and that the trial court was not deprived of subject matter jurisdiction when Defendant appropriated an additional sum to Plaintiff. This assignment of error is overruled.

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[2] Defendant argues next that the judgment must be vacated on the grounds that the statute authorizing Plaintiff's suit, N.C. Gen. Stat. § 115C-431 (2007) is "unconstitutional on its face or . . . unconstitutional as applied[.]" The Supreme Court of North Carolina recently issued its decision in *Beaufort County Bd. of Educ. v. Beaufort County Bd. of Comm'rs*, 363 N.C. 500, 681 S.E.2d 278 (2009). In *Beaufort*, the Court rejected similar constitutional challenges to N.C. Gen. Stat. § 115C-431. The defendant in *Beaufort* argued "that the statutory procedure in section 431(c) [] violates the constitutional requirement [of N.C. Const. art. I, § 6] that '[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.'" *Id.* at 502, 681 S.E.2d at 281. The Court rejected this argument, and held that:

The State Board of Education (the State Board) is given the general administrative and supervisory role over public education[.] . . . The statutory provisions enacted by the legislature and guidelines adopted by the State Board, when viewed together, comprehensively define the phrase "a system of free public schools" used in section 431(c). Since the General Assembly has so exhaustively defined its desired [school] system, the section 431(c) procedure does no more than invite the courts to adjudicate a disputed fact: the annual cost of providing a countywide system of education under the policies chosen by the legislature and the State Board. . . . After finding the facts, the trial court enters judgment against the county commission[.] . . . It is the legislature, not the judiciary, which has assigned responsibility to local government by requiring that judgment be entered against the county commission if the court finds the cost of schooling is greater than the amount appropriated. The legislature has therefore neither assigned policy-making power to the courts nor otherwise delegated its authority, and the judiciary is at all times exercising a function traditionally assigned to it under our tripartite system of government.

. . . .

The provisions of section 431(c) thus comport with the State Constitution, and any complaints about the policy or wisdom of the challenged procedures must necessarily be directed to the General Assembly.

*Id.* at 503-05, 681 S.E.2d at 281-82. In the instant case, Defendant incorporated by reference the arguments of the defendant in

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*Beaufort*, and concedes that the “decision in the *Beaufort* case should be determinative of the constitutional issues raised herein[.]” We agree, and hold that the *Beaufort* decision resolves these issues in favor of Plaintiff. This assignment of error is overruled.

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[3] Defendant argues next that the trial court committed reversible error by denying Defendant’s motions for directed verdict, made at the end of the Plaintiff’s evidence and the end of all evidence. Defendant contends that it was entitled to a directed verdict in its favor, on the grounds that the Plaintiff failed to present evidence of “what sources [of funding] are under the control of the Board of County Commissioners to maintain a system of free public schools” which Defendant characterizes as “a key element of its statutory cause of action[.]” Defendant contends that § 115C-431(c) mandates that Plaintiff must offer, as a “critical element” of its claim, “evidence of the financial resources of the county board of commissioners, and arguably other demands thereon[.]” We disagree.

Under § 115C-431(c), if a school board files suit against the board of county commissioners:

The court shall find the facts as to the amount of money necessary to maintain a system of free public schools, and the amount of money needed from the county to make up this total. Either board has the right to have the issues of fact tried by a jury. . . . The issue submitted to the jury shall be what amount of money is needed from sources under the control of the board of county commissioners to maintain a system of free public schools.

N.C. Gen. Stat. § 115C-431 is titled “Procedure for resolution of dispute between board of education and board of county commissioners.” The statute is restricted to budget conflicts occurring at a county level, and does not address funding disputes between a local school board and a state or federal department or agency. This limitation is articulated in the statute’s directive to the trial court to find “the amount of money necessary to maintain a system of free public schools, and the amount of money needed from the county to make up this total” and is emphasized in the statute’s provision that, if the claim is tried before a jury, “[t]he issue submitted to the jury shall be what amount of money is needed from sources under the control of the board of county commissioners to maintain a system of free public schools.” (emphasis added). In other words, the jury is charged with determining the amount of money needed by the local school

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board. The phrase “from sources under the control of the board of county commissioners” modifies or describes “amount of money” and emphasizes that the jury is concerned only with the adequacy of the county appropriation, and not with the sufficiency of funds provided by the state or federal governments, or other sources. We conclude that, under § 115C-431(c), a school board must present evidence of (1) the amount of money it needs to maintain its school system, and (2) the amount it needs from the county in order to have the necessary amount. This assignment of error is overruled.

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[4] Defendant next argues that judgment should be vacated, on the grounds that Plaintiff failed to present evidence showing that Defendant “had not provided sufficient funds to the statutorily specified categories for which the county commissioners may be obligated to fund.” We disagree.

Defendant concedes that our decision on this argument “is contingent upon the Court’s ruling on prior issues in this case.” Specifically, Defendant acknowledges that we would reach this issue only if we first found that § 115C-431 “constitutional as applied, only if it relates to certain specific statutorily [sic] categories of funding.” This argument was expressly rejected in *Beaufort County*, 363 N.C. at 507, 681 S.E.2d at 284. (“We therefore reject the argument that the General Assembly has not assigned responsibility for current expenses to local governments.”). This assignment of error is overruled.

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[5] Due to the timing of this appeal, the parties did not have the benefit of the Supreme Court of North Carolina’s decision in *Beaufort*. In *Beaufort*, the Court invoked its general supervisory authority over lower courts provided for in Article IV, Section 12 of the North Carolina Constitution and addressed an issue not briefed by the parties: the trial court’s instruction to the jury defining the word “needed” in the jury’s determination of the amount of money needed to maintain the county school system. The Court held that:

The trial court instructed the jury that the word “needed” in section 431(c) means “that which is reasonable and useful and proper or conducive to the end sought.” Rather than conveying a restrictive definition of “needed,” . . . the instruction conveyed an impermissible, expansive definition of this statutory term. Because the instruction was in error, we must remand for a new trial. At that trial, the trial court should instruct the jury that sec-

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tion 431(c) requires the County Commission to provide that appropriation legally necessary to support a system of free public schools, as defined by Chapter 115C and the policies of the State Board. The trial court should also instruct the jury, in arriving at its verdict, to consider the educational goals and policies of the state, the budgetary request of the local board of education, the financial resources of the county, and the fiscal policies of the board of county commissioners.<sup>1</sup>

*Id.* at 507, 681 S.E.2d at 283.

The jurisdiction of the Supreme Court of North Carolina is conferred and defined by the constitution and not by the North Carolina General Assembly. *State ex rel. N.C. Utilities Commission v. Old Fort Finishing Plant*, 264 N.C. 416, 142 S.E.2d 8 (1965). However, the North Carolina Court of Appeals' jurisdiction under Article IV, Section 12 is limited to "appellate jurisdiction as the General Assembly may provide." The General Assembly has not granted to the North Carolina Court of Appeals general supervisory jurisdiction over the lower courts. Therefore, our court does not have broad remedial powers granted to the Supreme Court of North Carolina. Consequently, we have no jurisdictional authority to grant to the Appellants the same remedy granted in *Beaufort* regarding the jury instruction. As a result, since the jury instruction issue was not raised at trial or on appeal, we have no jurisdiction to remedy any defect therein. We must affirm the decision of the trial court.

Affirmed.

Judges CALABRIA and HUNTER, Jr. concur.

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1. *Beaufort* does not state whether, in a trial brought under § 115C-431(c), evidence must be introduced regarding "the educational goals and policies of the state, the budgetary request of the local board of education, the financial resources of the county, and the fiscal policies of the board of county commissioners." Nor does the opinion indicate the respective responsibilities of Plaintiff and Defendant for production of such evidence.

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GLORIA WOODARD, PETITIONER v. NORTH CAROLINA DEPARTMENT OF  
TRANSPORTATION, RESPONDENT

No. COA09-217

(Filed 17 November 2009)

**1. Constitutional Law— due process—notice—opportunity to be heard**

The administrative law judge (ALJ) did not violate petitioner's right to due process in a state employee termination case where the judge granted summary judgment for respondent and petitioner contended that she was denied notice of the basis for the motion and the opportunity to be heard. Petitioner did not explain how the ALJ's recitation of the statutory standard for summary judgment could be construed as a new argument.

**2. Public Officers and Employees— termination—findings of fact—sufficiency of evidence—dismissal letter**

The trial court did not err in a state employee termination case by affirming the State Personnel Commission's decision and order adopting the administrative law judge's findings where the findings to which petitioner objected constituted a summary of the evidence or significantly mischaracterized the underlying dismissal letter.

**3. Public Officers and Employees— termination—failure to follow rules—belief that others violated rules**

Summary judgment was correctly granted against petitioner in a state employee termination case where petitioner contended that there was an issue of fact concerning her perception that others were also violating respondent's rules. She did not offer legal precedent or logical reason to suggest that her own dishonesty would be mitigated by her alleged belief that others also violated those rules.

Appeal by Petitioner from judgment entered 25 November 2008 by Judge Howard E. Manning, Jr., in Wake County Superior Court. Heard in the Court of Appeals 3 September 2009.

*Schiller & Schiller, PLLC, by David G. Schiller, for Petitioner-Appellant.*

*Attorney General Roy Cooper, by Special Deputy Attorney General Neil Dalton, for Respondent-Appellee.*

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BEASLEY, Judge.

Petitioner (Gloria Woodard) appeals from the trial court's order, which affirmed an order of the State Personnel Commission (SPC), upholding Respondent's termination of Petitioner's employment. We affirm.

In 2006 Petitioner was employed as a Lieutenant and Assistant District Supervisor in Respondent's Motor Vehicles Division. Petitioner's position required her to conduct on-site audits of automobile dealerships. On 18 April 2006, Petitioner was dismissed from her employment for "unacceptable personal conduct." She received a dismissal letter informing her that she had been fired for "willful violation of known or written work rules"; "conduct unbecoming a State employee [and] detrimental to state service"; and "conduct for which no reasonable person should expect warning prior to dismissal." The dismissal letter further informed Petitioner of the "specific conduct issues" for which she was terminated:

1. Petitioner had admitted conducting at least fifteen (15) dealer audits from the office, without visiting the dealership premises, and then falsified her records of these inspections.
2. Petitioner had behaved in an "embarrassing and intimidating manner" towards a subordinate employee.

The dismissal letter also informed Petitioner that her actions violated "DMV License and Theft Bureau's Policy and Procedures, General Order 60, XVI, B, C, Periodic Dealer Compliance Audits; General Rules of Conduct, General Order 24, V, F, Conduct and Behavior; and General Order 24, V, F, Respect for Fellow Officers."

On 21 April 2006 Petitioner appealed her dismissal pursuant to Respondent's internal grievance procedures, and alleged that her dismissal was "both racially discriminatory and retaliatory[.]" By letter dated 27 April 2006, Respondent acknowledged Petitioner's appeal of her dismissal and stated its intention to investigate her claims. On 12 May 2006 Respondent's Human Resources Director informed Petitioner that its "investigation [had] resulted in no evidence to substantiate [her] allegation." Petitioner then sought a grievance hearing before a panel of NCDOT employees. On 1 August 2006 Respondent's Chief Deputy Secretary wrote Petitioner of his decision to uphold her dismissal. The Chief Deputy's letter stated that:

Your failure to make on sight visits to the dealerships and then filling out the audit forms as if you had, is unacceptable personal

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conduct, which alone justifies your dismissal. As an additional and separate issue. . . .

Your treatment of [your co-worker] as outlined above constitutes unacceptable personal conduct, which alone justifies your dismissal.

On 7 August 2006 Petitioner filed a petition seeking a hearing before the North Carolina Office of Administrative Hearings (OAH). Petitioner asserted that Respondent had “unlawfully dismissed Petitioner from employment without just cause” and that she had “not commit[ted] any alleged wrongdoing.”

In addition to seeking relief through Respondent’s internal grievance procedures:

On May 19, 2006, the [Petitioner] filed her Complaint in . . . Mecklenburg County, North Carolina, alleging claims for race-based discrimination and retaliation in violation of Title VII, 42 U.S.C. § 1983, and the North Carolina and United States Constitutions. On June 26, 2006, the Defendants removed the state court action to federal court.

*Woodard v. N.C. DOT*, 2007 U.S. Dist. LEXIS 66873 at 8 (W.D.N.C. Sept. 7, 2007). Petitioner’s hearing before the OAH was stayed pending the outcome of Petitioner’s federal claim. On 7 September 2007 a United States Magistrate Judge granted summary judgment for Respondent in *Woodard*, and dismissed Petitioner’s claim. The Court’s opinion held in pertinent part:

[On] March 17, 2006, the Plaintiff’s behavior toward a former subordinate, Paula Norman, was viewed as “embarrassing and intimidating.” . . . [I]t is the history of the Plaintiff’s disrespectful and intimidating behavior toward Ms. Norman in 2004, when the [Petitioner] supervised her, which quite reasonably caused this incident to be perceived as negatively as it was.

On March 30, 2006, the Plaintiff admitted to her District Supervisor . . . that she had been conducting dealer audits from the Charlotte District Office rather than actually visiting the premises of the dealerships as required. The Plaintiff completed fifteen audits in this unauthorized manner—and on each occasion submitted official reports containing false information. Plaintiff does not deny that she completed off-site audits[.]

. . .

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[T]he Plaintiff admitted to a major problem with her job performance. She was completing dealership audits dishonestly. She has presented no evidence besides her own speculation that other employees completed audits in this manner, and that this somehow excuses her dishonesty.

*Id.* at 4-6, 17.

On 5 December 2007 Respondent filed a summary judgment motion with the OAH, asserting that “there is no genuine issue as to any material fact . . . and [Respondent] is entitled to judgment as a matter of law.” In its memorandum in support of its summary judgment motion, Respondent argued that the doctrine of collateral estoppel should be applied to bar relitigation of factual issues common to both Petitioner’s federal case and her OAH claim.

On 13 February 2008, an OAH Administrative Law Judge (ALJ) issued a decision recommending that the State Personnel Commission (SPC) grant Respondent’s motion for summary judgment. The ALJ issued an amended decision on 27 February 2008, correcting a typographical error. Petitioner filed exceptions to the ALJ’s decision, and on 29 May 2008 the SPC issued a final agency decision affirming Petitioner’s dismissal. Petitioner sought judicial review of the SPC’s decision. On 25 November 2008 the trial court entered an order affirming the SPC’s decision to uphold the ALJ. Petitioner has appealed from this order.

Standard of Review

N.C. Gen. Stat. § 150B-51(b) (2007) allows a trial court to reverse or modify an agency’s decision if the substantial rights of the petitioner have been prejudiced because the agency’s findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional provisions;
- (2) In excess of the statutory authority or jurisdiction of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or

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(6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b).

“In cases appealed from administrative tribunals, we review questions of law *de novo* and questions of fact under the whole record test.” *Diaz v. Division of Soc. Servs.*, 360 N.C. 384, 386, 628 S.E.2d 1, 2 (2006) (citations omitted). “An appellate court reviewing a superior court order regarding an agency decision ‘examines the trial court’s order for error of law. The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly.’” *Holly Ridge Assocs., LLC v. N.C. Dep’t of Env’t & Natural Res.*, 361 N.C. 531, 535, 648 S.E.2d 830, 834 (2007) (quoting *ACT-UP Triangle v. Comm’n for Health Servs.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997)).

[1] Petitioner argues first that “the tribunals below violated [her] right to due process” on the grounds that she “was denied notice of the basis of [Respondent’s] dispositive motion and was denied the opportunity to be heard on it.” We disagree.

As discussed above, Respondent filed a summary judgment motion with the OAH, in which it asserted that there were no genuine issues of material fact and that Respondent was entitled to summary judgment as a matter of law. In a memorandum of law supporting its motion, Respondent urged that the findings of the United States Magistrate Judge in *Woodard* were binding on the OAH, based on the doctrine of collateral estoppel. In its decision granting Respondent’s summary judgment motion, the ALJ ruled that “Respondent proved there are no genuine issues of material fact that Respondent had just cause to dismiss Petitioner from employment.”

On appeal, Petitioner characterizes the ALJ’s determination that summary judgment was proper because there were no genuine issues of material fact as a “new theory of the case.” Petitioner contends that she was subjected to “trial by ambush” and that her right to due process was violated because she had no notice or opportunity to be heard regarding “the new argument advanced by the ALJ.” However, Petitioner does not dispute that Respondent filed a summary judgment motion wherein it asserted the absence of any genuine issues of material fact. Nor does Petitioner challenge the familiar rule that summary judgment is properly granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

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affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2007).

Petitioner articulates no theory to explain how the ALJ’s recitation of the statutory standard for summary judgment could be construed as a “new argument advanced by the ALJ.” This assignment of error is overruled.

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**[2]** Petitioner next argues that the trial court erred in affirming the State Personnel Commission’s Decision and Order which adopts the ALJ’s Findings of Fact No. 10(b), (c), and (d), on the grounds that these findings of fact “exceed the scope of the dismissal letter, in violation of N.C. Gen. Stat. § 126-35.” We disagree.

The challenged findings of fact state that:

10. (b) Petitioner filed 15 audit reports containing false information that implied Petitioner inspected the premises subject to those audits. Petitioner admitted she never requested permission from her supervisor to conduct audits in such a manner.
10. (c) Robinson also noted that Petitioner violated written work rules, and engaged in unacceptable conduct by belittling Paula Norman, Petitioner’s subordinate employee, in front of other employees, and by humiliating Norman in a manner that brought disgrace upon the License and Theft Bureau.
10. (d) Attached to Robinson’s affidavit were EEO Consultant George Nixon’s notes from his interviews during the internal investigation. Mr. Nixon verified his interview notes by signing the notes. He noted that Purnell Sowell, Petitioner’s supervisor, heard Petitioner “speak down” to Ms. Norman in front of others, made Norman cry on several occasions, and embarrassed Norman in front of her co-workers. In addition, Mr. Nixon interviewed Petitioner, and noted that Petitioner admitted she did audits in the office to save time as her office does 1200 audits per year. She admitted that she knew she violated DMV policy by doing so. She admitted telling her supervisor, Purnell, that she was doing audits when he saw her doing audits in her office.

Petitioner contends that the “dismissal letter does not state the events described in the Decision, FOF # 10(b), (c) and (d) as reasons

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for [Petitioner's] dismissal[.]" and asserts that the "termination letter merely asserts that [Petitioner] said hello to a co-worker at a funeral."

We first note that the ALJ's finding of fact 10(d) is not actually a finding of the ALJ, but a summary of some of the evidence before it. *See, e.g., In re L.B.*, 184 N.C. App. 442, 450, 646 S.E.2d 411, 415 (2007) ("verbatim recitations of the testimony of each witness do not constitute findings of fact by the trial judge' ") (quoting *In re Green*, 67 N.C. App. 501, 505 n.1, 313 S.E.2d 193, 195 (1984)). In the instant case, the only "fact" found by the ALJ in Finding 10(d) is that EEO Consultant George Nixon made certain notes of his interviews and investigation. Petitioner neither disputes the accuracy of the ALJ's summary of Nixon's notes, nor demonstrates prejudice arising from the inclusion of this recitation.

The dismissal letter states in relevant part that:

After careful consideration of all the information made available to me, including your comments at the pre-disciplinary conference. . . . I have decided to dismiss you for unacceptable personal conduct. The specific conduct issues that represent the basis for the dismissal are:

1. Willful violation of known or written work rules[.]
2. Conduct unbecoming a State employee detrimental to state service[.]
3. Conduct for which no reasonable person should expect warning prior to dismissal[.]

On March 30, 2006, you admitted to your District Supervisor, Mr. Purnell Sowell, that you had been conducting dealer audits at the Charlotte District Office in lieu of actually visiting the premises of the dealerships. . . . By conducting, recording and reporting these inspections improperly, you falsified your record of inspections. At least fifteen (15) audits were conducted in this manner.

On March 17, 2006, while attending a visitation service, your actions toward Auditor Paula Norman, a subordinate employee, were perceived as embarrassing and intimidating. . . . Two fellow supervisors witnessed these actions.

The ALJ's findings of fact 10(b) and (c) address the same issues that are discussed in the dismissal letter. We conclude that Petitioner's contention, that the dismissal letter "merely asserts that

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Ms. Woodard said hello to a co-worker at a funeral” is a significant mischaracterization of the letter’s contents.

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[3] Finally, Petitioner argues that the trial court erred by affirming the summary judgment order “because a review of the record reveals material disputes of fact.” We disagree.

Petitioner was dismissed from employment for two separate aspects of her job performance: her violation of Respondent’s rule requiring audits to be conducted on-site, and her treatment of co-worker Paula Norman. In his letter upholding Petitioner’s dismissal, Respondent’s Chief Deputy Secretary states that either of these transgressions “is unacceptable personal conduct, which alone justifies your dismissal.”

Petitioner neither asserts any issue of fact regarding her behavior towards Ms. Norman, nor argues that her treatment of Norman, standing alone, does not constitute just cause for her dismissal.

Regarding Petitioner’s violation of Respondent’s rules for conducting audits, Petitioner does not dispute the existence of a rule requiring audits to be conducted on site, and does not deny violation of this rule. Nor does Petitioner argue that willful violation of this rule and intentional falsification of her audit records does not constitute just cause for dismissal. Instead, Petitioner posits the existence of an “issue of fact” regarding her perception that other employees had violated the same rule. She asserts that, if she violated Respondent’s rule “because she observed others doing it and concluded that it was acceptable to perform the audits in this manner, then she was not being dishonest.” Petitioner fails to offer any legal precedent or logical reason to suggest that her own dishonesty would be mitigated by her alleged belief that other employees also violated Respondent’s rules. This assignment of error is overruled.

We find it necessary to remind Petitioner’s counsel that N.C. Gen. Stat. § 1A-1, Rule 11(a) (2007) provides in pertinent part that:

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name[.] . . . The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith

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argument for the extension, modification, or reversal of existing law[.] . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction[.]

For the reasons discussed above, we conclude that the trial court did not err and that its order should be

Affirmed.

Judges STEPHENS and HUNTER, JR. concur.

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JESSICA HARDY, A MINOR, BY AND THROUGH HER PARENT, GAIL HARDY, AND VIKTORIA KING, A MINOR, BY AND THROUGH HER PARENT, REVONDIA HARVEY-BARROW, PETITIONERS-APPELLANTS v. BEAUFORT COUNTY BOARD OF EDUCATION, RESPONDENT-APPELLEE

No. COA09-132

(Filed 17 November 2009)

**1. Schools and Education— judicial review of board of education’s decision—long-term suspension—res judicata and collateral estoppel**

The superior court exercised the appropriate standard of review in affirming the long-term suspensions of two students for fighting, even though the literal language of the superior court’s order seemingly dismissed appellants’ respective petitions for judicial review. Moreover, the doctrines of *res judicata* and collateral estoppel prevented petitioners from asserting a claim that they had previously asserted in a companion case.

**2. Schools and Education— due process—admission of guilt**

The superior court did not err in a declaratory judgment action by determining petitioners were provided due process in two administrative hearings that upheld their long-term suspensions from school. A procedural due process denial cannot be established when the student admits guilt since prejudice cannot be shown. Even so, there was no evidence that correction of these alleged violations would have produced a more favorable outcome for petitioners.

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Appeal by petitioners from orders entered 16 September 2008 by Judge William C. Griffin, Jr. in Beaufort County Superior Court. Heard in the Court of Appeals 1 September 2009.

*Advocates for Children's Services, Legal Aid of North Carolina, Inc., by Erwin Byrd and Lewis Pitts; and Children's Law Clinic, Duke University School of Law, by Jane Wettach, for the petitioners-appellants.*

*Tharrington Smith, L.L.P., by Curtis H. Allen III and Robert M. Kennedy, Jr., for defendant-appellees.*

*Roberts & Stevens, P.A., by Christopher Z. Campbell on behalf of North Carolina School Boards Association; and North Carolina School Boards Association, by Allison B. Schafer, amicus curiae.*

*North Carolina Justice Center, by Jack Holtzman, on behalf of Concerned Citizens for the Betterment of Beaufort County Schools, North Carolina Community Advocates for Revitalizing Education, and the North Carolina Justice Center, amici curiae.*

CALABRIA, Judge.

### I. Background

Jessica Hardy, a minor, by and through her parent, Gail Hardy, and Viktoria King, a minor, by and through her parent, Revondia Harvey-Barrow (collectively "petitioners"), appeal orders dismissing petitioners' declaratory judgment claims pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure and affirming the decision of the Beaufort County School Board ("the Board"). We affirm the trial court.

Petitioners were tenth grade students at Southside High School in Beaufort County during the 2007-2008 school year. On 18 January 2008, multiple fights involving numerous students occurred at the school. One of these fights was between petitioners. As a result, petitioners were subsequently suspended for ten days, beginning 24 January 2008. Additionally, Dr. Todd Blumenreich, the principal of Southside High School ("the principal") recommended to Beaufort County School Superintendent Jeffrey Moss ("the superintendent"), long-term suspensions for petitioners for the remainder of the school year. The superintendent followed this recommendation and on 1 February 2008 suspended petitioners for the remainder of the 2007-

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2008 school year. The superintendent provided each petitioner an appeal form, and these forms were completed and returned to the school on 6 February 2008.

Pursuant to procedures enacted by the Board, students may appeal their long-term suspensions first to the superintendent or his designee(s) and then to the Board itself. On 13 February 2008, petitioners each received their first review before a panel of administrators designated by the superintendent (“the panel”). At those hearings (“the panel hearings”), the principal explained to the panel the reasoning behind his recommendations. Petitioners, who were each represented by their mothers at their respective panel hearings, were given the opportunity to offer arguments to the panel as to why the length of the suspensions were inappropriate. Each mother admitted her daughter’s involvement in the fight but maintained that overall they were good students and would benefit from another chance.

After the panel hearings, the panel recommended upholding both petitioners’ long-term suspensions. The superintendent followed these recommendations. Petitioners then appealed their suspensions to the Board.

On 6 March 2008, petitioners each received a hearing before the Board (“the Board hearings”). Because it appeared the panel who conducted the panel hearings had considered evidence that had not been formally introduced, the Board voted to conduct *de novo* hearings in order to allow petitioners to respond to any and all of the evidence against them. Each petitioner was represented by an attorney at the Board hearings. After the Board hearings, the Board voted to uphold petitioners’ respective long-term suspensions.

Subsequently, each petitioner filed a Petition for Judicial Review and Complaint for Declaratory Judgment against the Board in Beaufort County Superior Court. The Board filed motions to dismiss both of petitioners’ actions. The trial court dismissed petitioners’ declaratory judgment claims pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2007) for failure to state a claim upon which relief could be granted and affirmed the decision of the Board. Petitioners, after joining their individual actions, appeal.

**II. Dismissal Pursuant to Rule 12(b)(6)**

[1] Petitioners argue that the superior court erred by dismissing their Petitions for Judicial Review pursuant to Rule 12(b)(6). After a careful review of the superior court’s order, we disagree.

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The actions initiated by petitioners each contained two distinct parts: (1) a “Complaint for Declaratory Judgment” and (2) a “Petition for Judicial Review.” The superior court’s final disposition of the case also contained two parts. The superior court: (1) dismissed petitioners’ declaratory judgment claims pursuant to Rule 12(b)(6) and (2) affirmed the decision of the Board upholding petitioners’ suspensions. These separate dispositions indicate that the trial court considered the two parts of petitioners’ pleadings separately, and we review the superior court’s determinations accordingly.

A. Dismissal of Declaratory Judgment

The test on a motion to dismiss for failure to state a claim upon which relief can be granted is whether the pleading is legally sufficient. A legal insufficiency may be due to an absence of law to support a claim of the sort made, absence of fact sufficient to make a good claim or the disclosure of some fact which will necessarily defeat the claim. When making a ruling under this rule, the complaint must be viewed as admitted and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted.

*State of Tennessee v. Envtl. Mgmt. Comm.*, 78 N.C. App. 763, 765, 338 S.E.2d 781, 782 (1986) (internal citations omitted).

Petitioners’ respective Complaints for Declaratory Judgment contained three distinct claims. Petitioners asserted that: (1) N.C. Gen. Stat. § 115C-391(c) violated petitioners’ fundamental right to have the opportunity to obtain a sound, basic education and was therefore unconstitutional; (2) the procedures contained in N.C. Gen. Stat. § 115C-391(c) & (e) did not adequately provide petitioners with due process; and (3) N.C. Gen. Stat. § 115C-391 (c) & (e) violated petitioners’ constitutional right to equal protection of the law. The superior court dismissed each of these claims. On appeal, petitioners assign error only to dismissal of their first declaratory judgment claim, that N.C. Gen. Stat. § 115C-391(c) violates petitioners’ fundamental right to have the opportunity to obtain a sound, basic education.

Petitioners argue that the final decision of the Board, approving the long-term suspension imposed by the superintendent, violated their fundamental right to a sound, basic education that was established by our Supreme Court in *Leandro v. State of North Carolina*, 346 N.C. 336, 488 S.E.2d 249 (1997). Petitioners have previously liti-

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gated this claim, which was appealed to and considered by this Court in the companion cases *King v. Beaufort Cty. Bd. of Educ.*, — N.C. App. —, — S.E.2d — (2009) and *Hardy v. Beaufort Cty. Bd. of Educ.*, — N.C. App. —, — S.E.2d (2009), where the claim was found to be without merit. The superior court correctly concluded that under the doctrines of *res judicata* and collateral estoppel, petitioners were not permitted to pursue their same *Leandro* claim again in the instant case. This assignment of error is overruled.

**B. Review of the Board's Decision**

The standard of review on appeal from a decision of a local board of education is set forth in N.C. Gen. Stat. § 150B-51(b), which provides that the reviewing court may:

reverse or modify the agency's decision, or adopt the administrative law judge's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions or decisions are:

(1) In violation of constitutional provisions; (2) In excess of the statutory authority or jurisdiction of the agency; (3) Made upon unlawful procedure; (4) Affected by other error of law; (5) Unsupported by substantial evidence . . . in view of the entire record as submitted; or (6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2007).

The proper standard for the superior court's judicial review depends upon the particular issues presented on appeal. When the petitioner contends that the decision of the agency, here the local school board, was unsupported by the evidence or was arbitrary or capricious, then the reviewing court must apply the "whole record" test. The "whole record" test requires the reviewing court to examine all competent evidence (the "whole record") in order to determine whether the agency decision is supported by "substantial evidence." Substantial evidence is that which a reasonable mind would regard as adequately supporting a particular conclusion. When the petitioner argues that the decision of the agency violates a constitutional provision, the reviewing court is required to conduct a *de novo* review.

*In re Roberts*, 150 N.C. App. 86, 90, 563 S.E.2d 37, 40 (2002) (internal quotations and citations omitted), *overruled on other grounds by*

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*N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 599 S.E.2d 888 (2004). This Court “examines the trial court’s order for error of law. The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly.” *Amanini v. N.C. Dep't of Human Resources*, 114 N.C. App. 668, 675, 443 S.E.2d 114, 118-19 (1994) (internal citations omitted).

In the instant case, each of the trial court’s orders included the following conclusions of law:

3. After reviewing the Board’s alleged violations of petitioner’s constitutional rights de novo, the Court finds no violation of petitioner’s right to due process, equal protection, or to the opportunity for a sound, basic education.
4. Applying the whole record test to petitioner’s claims that the Board abused its discretion and acted arbitrarily and capriciously, the Court finds that the decision of the Board upholding petitioner’s long term suspension was not arbitrary, capricious, or an abuse of discretion.

These conclusions indicate that even though the literal language of the superior court’s order seemingly dismissed petitioners’ respective “Petitions for Judicial Review,” the superior court in fact exercised the appropriate appellate standard of review in affirming the Board’s decision. This assignment of error is overruled.

### III. Due Process

[2] Petitioners argue that the superior court erred in determining they were provided due process in the two administrative hearings that upheld their long-term suspensions. Specifically, petitioners argue that their due process rights were violated because (1) due process requires a full evidentiary pre-deprivation hearing before the imposition of a long-term suspension; and (2) the Board failed to follow its own published policies when it reviewed petitioners’ suspensions. We disagree.

When petitioners allege that an agency’s decision, here the local school board, is based on an error of law, the proper review is *de novo* review. *Carroll*, 358 N.C. at 659, 599 S.E.2d at 894. “Under the *de novo* standard of review, the trial court considers the matter anew and freely substitutes its own judgment for the agency’s.” *Id.* at 660, 599 S.E.2d at 895 (internal quotation and citation omitted).

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“[A] student facing suspension has a property interest that qualifies for protection under the Due Process Clause of the Fourteenth Amendment.” *Roberts*, 150 N.C. App. at 92, 563 S.E.2d at 41 (citation omitted). “The student’s interest is to avoid unfair or mistaken exclusion from the educational process. . . .” *Id.* at 92, 563 S.E.2d at 42 (internal quotation and citation omitted). “In order to establish a denial of due process, a student must show substantial prejudice from the allegedly inadequate procedure.” *Watson ex rel. Watson v. Beckel*, 242 F.3d 1237, 1242 (10th Cir. 2001). In *Roberts*, this Court determined that when a student factually disputes the basis for his or her long-term suspension, due process requires that the student “have the opportunity to have counsel present, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident.” 150 N.C. App. at 93, 563 S.E.2d at 42.

In the instant case, it is important to note that throughout the appeals process, both petitioners, unlike the student in *Roberts*, admitted their involvement in the altercation that led to their suspensions. The arguments made by petitioners’ parents during the panel hearings and by petitioners’ attorney during the Board hearings were attempts to mitigate petitioners’ punishments; they did not attempt to challenge petitioners’ guilt. Under these circumstances, it is unnecessary to determine whether the Board’s procedure violated petitioners’ due process rights.

A procedural due process denial cannot be established when the student admits guilt because prejudice cannot be shown. *See, e.g., Beckel*, 242 F.3d at 1242; *Keough v. Tate County Bd. of Educ.*, 748 F.2d 1077, 1083 (5th Cir. 1984). Even assuming, *arguendo*, that the due process violations alleged by petitioners were substantiated, there is no evidence that correction of these alleged violations would have produced a more favorable outcome for petitioners. After admitting their guilt, petitioners were provided ample opportunities to argue for mitigation of their punishment in the administrative hearings before the panel and the Board. Petitioners have failed to show an “unfair or mistaken exclusion from the educational process. . . .” *Roberts*, 150 N.C. App. at 92, 563 S.E.2d at 42. While a different result may have been reached under these facts if petitioners had been contesting the factual basis for their suspensions, we hold that in the circumstances of the instant case petitioners failed to prove they were denied procedural due process.

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**IV. Conclusion**

The record on appeal includes an additional assignment of error not addressed by petitioners and cross-assignments of error not addressed by the Board in their respective briefs to this Court. Pursuant to N.C.R. App. P. 28(b)(6) (2008), we deem these assignments of error abandoned and need not address them. The trial court properly dismissed petitioners' declaratory judgment claims and properly affirmed the decision of the Board.

Affirmed.

Judges WYNN and ELMORE concur.

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TANDS, INC., PLAINTIFF v. COASTAL PLAINS REALTY, INC., DEFENDANT

No. COA08-1143

(Filed 17 November 2009)

**1. Appeal and Error—interlocutory orders—partial summary judgment—intertwined with remaining issues**

An appeal from an interlocutory order was dismissed in an action involving default on a commercial real property lease where the court granted partial summary judgment for defendant on mitigation of damages, but the issues of overage rent and the amount of defendant's potential liability were "hopelessly intertwined" with the duty to mitigate and remained unresolved.

**2. Appeal and Error—interlocutory orders—partial summary judgment—different result from new trial—distinct from inconsistent verdicts**

Plaintiff was not entitled to appellate review of a partial summary judgment based on the possibility of inconsistent verdicts. A different result from a new trial granted after the current trial is distinct from the possibility of inconsistent verdicts in multiple trials.

Appeal by plaintiff from order entered 17 June 2008 by Judge Paul L. Jones in Lenoir County Superior Court. Heard in the Court of Appeals 26 February 2009.

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[201 N.C. App. 139 (2009)]

*White & Allen, P.A., by John P. Marshall, for plaintiff-appellant.**Hopf & Higley, P.A., by Donald S. Higley, II, for defendant-appellee.*

JACKSON, Judge.

Tands, Inc. ("plaintiff") appeals the 17 June 2008 order denying its motion for partial summary judgment and granting partial summary judgment in favor of Coastal Plains Realty, Inc. ("defendant"). For the following reasons, we dismiss.

On 19 December 1980, plaintiff and Eastern Realty Company ("Eastern") entered into a contractual agreement concerning the leasing of certain property located on Memorial Drive in Greenville, North Carolina, owned by Eastern, for the purpose of plaintiff's operating a Bojangles Famous Chicken'n Biscuits restaurant ("Bojangles"). Plaintiff operated the Bojangles, and on 8 May 2001, plaintiff and Eastern's successor in title, defendant, signed an Extension of lease agreement. This new agreement extended the term of the lease for an additional ten years. The agreement provided that "[e]xcept as modified by this Extension of lease agreement, each and every provision of the original lease shall remain in full force and effect."

The lease agreement set forth two different types of rent to be paid by plaintiff to defendant. An Annual minimum rent, related to the value of the land, was to be paid in monthly installments. In addition to the Annual minimum rent, an Overage rent was to be paid. The Overage rent was comprised of a percentage of plaintiff's gross receipts from the operation of the business. Plaintiff also was required to pay additional rents related to other expenses as they occurred (*e.g.*, taxes and insurance).

On 15 December 2006, plaintiff ceased operating its Bojangles restaurant and abandoned the property, having made plans to move its Bojangles operation to a different location in Greenville. The abandonment constituted an "Event of default" as defined by the original lease agreement and incorporated into the Extension of lease agreement. Pursuant to the original lease agreement, a default resulted in the remainder of all rent owed for the duration of the ten-year lease period to become "at once due and payable without notice or demand." Additionally, once a default occurred, defendant gained a right of ejectment and could relet the property.

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It is undisputed that plaintiff has not paid in full the remainder of money owed for the ten-year lease. There is an apparent discrepancy between the parties as to whether plaintiff has continued to pay defendant the Minimum Annual Rent as though plaintiff had not defaulted or whether these payments ended between 2006 and 2008.

On 23 July 2007, plaintiff filed an action for declaratory judgment. Plaintiff asked the trial court to determine defendant's duty to mitigate its damages and plaintiff's responsibilities concerning payment of Overage rent. Plaintiff also challenged the legitimacy of the rent acceleration, suggesting that rent should be paid into an escrow account, so as to better serve public policy and to better determine the rent owed after mitigation. Defendant filed a counterclaim on 15 August 2007 seeking immediate payment of the Annual minimum rent, estimated Overage rent, and other Additional rents, totaling \$516,647.22. Each party requested that costs be charged against the opposing party.

On 21 April 2008, plaintiff filed a Motion for Partial Summary Judgment, stating that there is no genuine issue of material fact concerning whether or not plaintiff is required to pay Overage rent for the duration of the lease and that the trial court should rule in its favor on that issue. Plaintiff and defendant filed cross-motions for partial summary judgment on the issue of mitigating damages, agreeing that no genuine issue of material fact exists on that issue. On 17 June 2008, the trial court granted defendant's motion for partial summary judgment, finding as a matter of law that defendant did not have a duty to mitigate damages. In the same judgment, the trial court denied plaintiff's motion for summary judgment, stating that the absence of language concerning overage rent payments after an event of default created a material issue of fact concerning the intent of the parties. Plaintiff appeals the order, challenging the granting of defendant's motion for partial summary judgment and the denial of both of plaintiff's motion for partial summary judgment. Pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure, the trial court granted certification on both issues, stating there was no just reason to delay appeal.

**[1]** Initially, we note that the trial court's order does not resolve all issues between the parties. The trial court's order, therefore, is not a final judgment. A final judgment "disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court[.]" an order which does not do so is interlocutory. *Veazey v. Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950).

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*See also* N.C. Gen. Stat. § 1A-1, Rule 54 (2007); *Liggett Group v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993). Interlocutory orders generally are not reviewable by this Court. *See Liggett*, 113 N.C. App. at 23, 437 S.E.2d at 677. Our Supreme Court has explained that “[t]he purpose of this rule is ‘to prevent fragmentary and premature appeals that unnecessarily delay the administration of justice and to ensure that the trial divisions fully and finally dispose of the case before an appeal can be heard.’” *Sharpe v. Worland*, 351 N.C. 159, 161, 522 S.E.2d 577, 578-79 (1999) (quoting *Bailey v. Gooding*, 301 N.C. 205, 209, 270 S.E.2d 431, 434 (1980)); *accord Waters v. Personnel, Inc.*, 294 N.C. 200, 207, 240 S.E.2d 338, 343 (1978). “[T]here is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders.” *Sharpe*, 351 N.C. at 161, 522 S.E.2d at 579 (quoting *Veazey*, 231 N.C. at 363, 57 S.E.2d at 382).

There are two ways by which an interlocutory order may be appealed.

First, an interlocutory order can be immediately appealed if the order is final as to some but not all of the claims . . . and the trial court certifies there is no just reason to delay the appeal [pursuant to North Carolina Rules of Civil Procedure, Rule 54(b)]. Second, an interlocutory order can be immediately appealed under [North Carolina General Statutes, section] 1-277(a) (1983) and 7A-27(d)(1) (1995) if the trial court’s decision deprives the appellant of a substantial right which would be lost absent immediate review.

*Bartlett v. Jacobs*, 124 N.C. App. 521, 524, 477 S.E.2d 693, 695 (1996), *disc. rev. denied*, 345 N.C. 340, 483 S.E.2d 161 (1997) (citations and internal quotation marks omitted).

With respect to a trial court’s certification pursuant to Rule 54(b), our Supreme Court has explained that “[w]hen the trial court certifies its order for immediate appeal under Rule 54(b), appellate review is mandatory.” *Sharpe*, 351 N.C. at 162, 522 S.E.2d at 579 (citing *DKH Corp. v. Rankin-Patterson Oil Co.*, 348 N.C. 583, 585, 500 S.E.2d 666, 668 (1998)). “Nonetheless,” the Court continued, “the trial court may not, by certification, render its decree immediately appealable if ‘[it] is not a final judgment.’” *Id.* (quoting *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 425, 302 S.E.2d 868, 871 (1983)). *See also Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 491, 251 S.E.2d 443,

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447 (1979) (“*Tridyn Industries*”) (“That the trial court declared it to be a final, declaratory judgment does not make it so.”). Therefore, we have held that “[t]he trial court’s determination that there is no just reason to delay the appeal, while accorded great deference, . . . cannot bind the appellate courts because ruling on the interlocutory nature of appeals is properly a matter for the appellate division, not the trial court.” *Bumpers v. Cmty. Bank of N. Va.*, 196 N.C. App. 713, 717, 675 S.E.2d 697, 699 (2009) (quoting *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 247, 507 S.E.2d 56, 60 (1998)) (citations omitted).

In *Bumpers*, we recently explained that “[North Carolina Rules of Civil Procedure, Rule 54(b)] contemplates the entry of a judgment as to fewer than all claims or parties. It does not contemplate the fragmentation of the claims themselves or provide for the immediate appeal of less than the entire claim.” *Bumpers*, 196 N.C. App. at 717, 675 S.E.2d at 700 (internal citation omitted). We further explained that in *Tridyn Industries*, “[o]ur Supreme Court . . . stated ‘[t]he cases uniformly hold’ that ‘a partial summary judgment entered for plaintiff on the issue of liability only leaving for further determination at trial the issue of damages’ is not immediately appealable.” *Id.* (citing *Tridyn Industries*, 296 N.C. at 492, 251 S.E.2d at 448).

In the case *sub judice*, the trial court granted defendant’s motion for partial summary judgment on plaintiff’s claim that defendant had a duty to mitigate its damages. The trial court also denied plaintiff’s motion for partial summary judgment on the issues of (1) defendant’s duty to mitigate, and (2) the overage rent sought by defendant. Pursuant to the trial court’s Rule 54(b) certification, plaintiff appealed to this Court, and defendant filed a motion to dismiss plaintiff’s appeal. In plaintiff’s reply to defendant’s motion, plaintiff initially relies upon appellate jurisdiction pursuant to the trial court’s Rule 54(b) certification, but plaintiff also alleges that jurisdiction lies pursuant to North Carolina General Statutes, section 1-277, arguing that a substantial right exists that will be lost absent immediate review. In this argument, plaintiff concedes that the issue of whether defendant has an obligation to mitigate its damages is “hopelessly intertwined” with the question of plaintiff’s possible liability for overage rent. We agree, but it is for that reason that we are unable to review the matter notwithstanding the trial court’s certification pursuant to Rule 54(b). See *Bumpers*, 196 N.C. App. at 717, 675 S.E.2d at 699; *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 247, 507 S.E.2d 56, 60 (1998). See also *Sharpe*, 351 N.C. at 162, 522

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S.E.2d at 579 (“[T]he trial court may not, by certification, render its decree immediately appealable if ‘[it] is not a final judgment.’”) (citation omitted); *Tridyn Industries*, 296 N.C. at 491, 251 S.E.2d at 447 (“That the trial court declared it to be a final, declaratory judgment does not make it so.”).

The trial court’s granting, in defendant’s favor, the parties’ motions for partial summary judgment as to defendant’s duty to mitigate is tantamount to an establishment of plaintiff’s liability on that issue. Because the issues of overage rent and the amount of plaintiff’s potential liability (*i.e.*, defendant’s possible damages award) remain unresolved, and because defendant’s purported duty to mitigate damages is indeed “hopelessly intertwined” with the amount and correctness of a damages award, we grant defendant’s motion to dismiss plaintiff’s appeal as interlocutory. *See Bumpers*, 196 N.C. App. at 718, 675 S.E.2d at 700 (“Our Supreme Court . . . stated ‘[t]he cases uniformly hold’ that ‘a partial summary judgment entered for [a party] on the issue of liability only leaving for further determination at trial the issue of damages’ is not immediately appealable.” (quoting *Tridyn Industries*, 296 N.C. at 492, 251 S.E.2d at 448)).

[2] Plaintiff also argues that it is entitled to appellate review of this interlocutory appeal because, without immediate review, plaintiff will be denied a substantial right. Plaintiff cites *Dalton Moran Shook, Inc. v. Pitt Dev. Co.*, 113 N.C. App. 707, 440 S.E.2d 585 (1994), in support of its argument that the prospect of two trials with inconsistent verdicts may constitute a denial of a substantial right. In *Dalton*, we interpreted established precedent:

Our Supreme Court has held that the right to avoid the possibility of two trials on the same issues can be a substantial right so as to warrant an immediate appeal under G.S. § 1-277 and G.S. § 7A-27(d). *Green v. Duke Power Co.*, 305 N.C. 603, 290 S.E.2d 593 (1982). Plaintiff contends that its claims against Wachovia and Hill involve issues of fact common to its claims against the other defendants and that if this appeal is dismissed, separate trials will be required to determine the identical issues. We agree.

*Dalton*, 113 N.C. App. at 710-11, 440 S.E.2d at 588.

In *Green v. Duke Power Co.*, 305 N.C. 603, 607, 290 S.E.2d 593, 596 (1982), the Supreme Court held and explained

that no substantial right would be lost by Duke’s inability to take an immediate appeal from the summary judgment against it. If

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Duke were to win in the principal action, Duke would have no right to appeal. G.S. 1-271 (only an aggrieved party may appeal). If Duke were to lose, its exception to the entry of summary judgment would fully and adequately preserve its right to thereafter seek contribution.

Under other circumstances third party defendants might be free at a subsequent trial to deny Duke's liability to plaintiffs Green, leaving the jury in the contribution trial free to find that Duke was not liable to plaintiffs Green despite a finding by a different jury in the principal case that Duke was liable. Such might be the case, for example, if third party defendants had never been brought into the principal action, or if, upon being impleaded, they had asserted as a defense to Duke's third party complaint that Duke was not liable in negligence to plaintiffs Green. We are faced with neither of these situations herein. The answers in instant case have already been filed. Both third party defendants alleged in their answers that "the active and primary negligence of Duke Power Company is pleaded in bar of Duke Power Company's claim for contribution from this defendant." Neither asserted in the alternative that Duke was not liable to plaintiffs Green for negligence.

*Id.*

We are not persuaded by plaintiff's argument that it will be denied a substantial right absent immediate appellate review. As in *Green*, plaintiff's right to appellate review may be preserved by an exception to the judgment. However, unlike *Green* and *Dalton*, plaintiff would not be subjected to inconsistent verdicts in multiple trials. Rather, plaintiff seeks to truncate the current proceedings and avoid the possibility of a new trial in the event that one should be granted upon plaintiff's anticipated appeal at the conclusion of the current proceedings. If plaintiff appeals the judgment rendered at the conclusion of the current trial, and if the appeal granted plaintiff a new trial, plaintiff may prevail pursuant to a favorable verdict and judgment. That a *different* result—one favorable to plaintiff—*may* be achieved in the event of a new trial is distinct from the possibility of being subjected to *inconsistent* verdicts in multiple trials, and therefore, plaintiff will not suffer the loss of a substantial right absent immediate review. The possibility of a protracted litigation cycle is a risk inherent in our legal system, and the desire to truncate the process does not give rise to a substantial right.

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Accordingly, without review available pursuant to the trial court's Rule 54(b) certification or on account of the loss of a substantial right absent immediate review, we hereby grant defendant's motion to dismiss plaintiff's interlocutory appeal.

Dismissed.

Judges STEPHENS and STROUD concur.

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STATE OF NORTH CAROLINA v. JOSHUA SCOTT REMLEY, DEFENDANT

No. COA08-1529

(Filed 17 November 2009)

**1. Discovery— violations—untimely disclosure of statement—recess instead of dismissal of charges or barring statement—abuse of discretion standard**

The trial court did not abuse its discretion in a prosecution for multiple counts of breaking or entering a motor vehicle and larceny case by granting a recess instead of imposing sanctions even though the court concluded the State had committed a discovery violation. The trial court's statement upon making its ruling demonstrated that it considered any possible prejudice to defendant, the various possibilities as to remedies, and that it was open to consider additional requests from defendant.

**2. Sentencing— multiple offenses—statutes read in conjunction**

The trial court erred in a prosecution for multiple breaking or entering a motor vehicle and larceny counts. The cumulative length of the sentences for two or more misdemeanors where the most serious is classified as class 1 cannot exceed 90 days, and defendant was erroneously sentenced to 150 days. While N.C.G.S. § 15A-1351 was not violated as to the sentences for each offense, the sentences must also be in compliance with N.C.G.S. § 15A-1340.22(a) when defendant is being sentenced for multiple offenses.

Appeal by defendant from judgments entered on or about 14 May 2008 and 9 June 2008 by Judge Jerry R. Tillett in Superior Court, Pitt County. Heard in the Court of Appeals 9 June 2009.

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[201 N.C. App. 146 (2009)]

*Attorney General Roy A. Cooper, III, by Assistant Attorney General Stanley G. Abrams, for the State.*

*Richard E. Jester, for defendant-appellant.*

STROUD, Judge.

Defendant was convicted by a jury of 10 counts of breaking or entering a motor vehicle and 8 counts of larceny. Defendant appeals, arguing the trial court erred by (1) failing to prohibit the State from admitting defendant's statement into evidence after the State failed to provide the statement to defendant in a timely manner pursuant to N.C. Gen. Stat. §§ 15A-902 and -903 and (2) sentencing him to a longer period of imprisonment than permissible for misdemeanor convictions under N.C. Gen. Stat. §§ 15A-1340.22 and -1340.23. For the following reasons, we find no error as to the admission of defendant's statement, but remand for resentencing.

### I. Background

On or about 26 November 2007, defendant was indicted for 21 counts of breaking or entering a motor vehicle and 15 counts of larceny. On 27 August 2007, Detective Linwood Mercer of the Pitt County Sheriff's Department took a statement from defendant which provided:

I Josh Remley come forth and say I did not do all of this but I did do [5 or 6]. One was a red car and it had \$20.00, one was a green car but it did not have anything in it, Then I got to the one that had a 38. Smith and Wesson gun, if I can get out I can and will get the gun and give it back, One had \$3.00 it was a blue car, the lasted [sic] one was a red Ford car and it did not have [anything in it.] And as for the rest of the stuff I don't kno[w] because I was with my wife at the house and I have a lot of people that will tell you that. I don't know the place we went but I do know about the wet suits and I can take you there. and there was car that I took a cell phone JR [signed Josh Remley]

During defendant's trial his attorney objected to the admission of the statement, but the trial court allowed it into evidence. The jury found defendant guilty of 10 counts of breaking or entering a motor vehicle and 8 counts of larceny. Defendant appeals.

### II. Admission of Statement

[1] Defendant contends that "the trial court erred in admitting the alleged confession of the defendant in violation of discovery statutes

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and constitutional safeguards.”<sup>1</sup> (Original in all caps.) Before defendant’s statement was admitted into evidence defendant’s attorney objected:

MR. ENTZMINGER [defendant’s attorney]: Judge, I have two basis [sic] for this objection. The first of all I question the authenticity of the statement. And secondly, I object to this statement coming in because of discovery rules. This statement was given to me yesterday, the second day of trial at three—around three o’clock in the afternoon. And I do not feel—I feel like because of the substance of the statement, it materially prejudices my client.

And I have received several other statements in discovery several months ago. And to receive this particular statement, which is incriminating to my client, on the day of trial where I have received several other statements months prior to this is not appropriate, Judge.

Ultimately the trial court determined in pertinent part:

The objection is overruled. The Court reserves the right to make any formal findings of fact and conclusions of law, should that be appropriate. And I will notify you of the decision so you may act accordingly. First of all the Court has considered the discovery issue and also the provisions of 15A, including 15A-910.

*The Court determines that the material was discoverable material and it should have been provided to the defendant in a timely manner and in any event prior to trial.* However, the Court determines that the statement was not available to the prosecutor or the District Attorney prior to the time when the statement was provided—or almost—substantially simultaneous with the detection of the statement by the prosecutor.

The Court determines that there has been no bad evidence of bad faith. None has been alleged. There has been no evidence of bad faith at this juncture. The Court has considered the totality of the circumstances surrounding the alleged failure to provide this article. There’s no other orders in place. It has considered that in the interest of justice that the—first of all the issue deals with a statement made by the defendant and the lawyers had access to the defendant at all times. The defendant is out at least

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1. Although defendant’s brief heading uses the word “constitutional” defendant fails to assert any constitutional arguments in his brief. Accordingly, we address only defendant’s argument as to violation of discovery statutes. *See* N.C. R. App. 28(b)(6).

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on bail. The Court finds no prejudice to the presentation of the case or evidence.

*The defendant was given a recess, given an opportunity to prepare. The Court also informed the defense counsel if there were any other requests other than either dismissing of the charges or prohibition of the introduction of the evidence, that the Court will consider those. There were none requested. No further recesses were requested. And no evidence of anything else that would be necessary to meet this evidence.*

The defendant and the lawyer were given the opportunity to be heard out of the presence of the jury prior to its introduction, and the Court has conducted a lengthy voir dire concluding with the defendant having the opportunity to present evidence as well as the Court. The Court has also observed several exhibits. The Court has also had the opportunity to weigh and judge credibility. So the exclusion of the evidence is denied; the objection is overruled. I will consider anything else that may be requested.

(Emphasis added.)

N.C. Gen. Stat. § 15A-910(a) provides:

(a) If at any time during the course of the proceedings the court determines that a party has failed to comply with this Article or with an order issued pursuant to this Article, the court in addition to exercising its contempt powers may

- (1) Order the party to permit the discovery or inspection, or
- (2) Grant a continuance or recess, or
- (3) Prohibit the party from introducing evidence not disclosed, or
- (3a) Declare a mistrial, or
- (3b) Dismiss the charge, with or without prejudice, or
- (4) Enter other appropriate orders.

N.C. Gen. Stat. § 15A-910(a) (2007).

Here, the trial court determined that the State failed to provide the defendant's statement in a timely manner. Under N.C. Gen. Stat. § 15A-910(a), the trial court may grant various remedies for a discovery violation, including granting inspection, granting a recess

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or continuance, prohibiting admission of the contested evidence, dismissal of charges or “other appropriate orders.” *Id.* Upon determining that the State had not provided the statement in a timely manner, the trial court granted defendant a “recess” and an “opportunity to prepare[,]” but denied defendant’s requests to dismiss the charges or exclude the evidence. However, upon making the ruling, the trial court stated it would “consider anything else that may be requested.” Defense counsel did not request any other sanctions or remedies.

Thus, defendant does not argue the trial court erred in finding a violation. Rather, defendant argues the trial court erred in providing an inadequate remedy. We review the trial court’s selection of a remedy for a violation of N.C. Gen. Stat. § 15A-910 for abuse of discretion. *See State v. McClary*, 157 N.C. App. 70, 75, 577 S.E.2d 690, 693 (citations omitted), *appeal dismissed and disc. review denied*, 357 N.C. 466, 586 S.E.2d 466 (2003).

It is within the trial court’s sound discretion whether to impose sanctions for a failure to comply with discovery requirements, including whether to admit or exclude evidence, and the trial court’s decision will not be reversed by this Court absent an abuse of discretion. An abuse of discretion results from a ruling so arbitrary that it could not have been the result of a reasoned decision or from a showing of bad faith by the State in its noncompliance.

*Id.* (citation omitted).

“[T]he purpose of discovery under our statutes is to protect the defendant from unfair surprise by the introduction of evidence he cannot anticipate.” *State v. Payne*, 327 N.C. 194, 202, 394 S.E.2d 158, 162 (1990), *cert. denied*, 498 U.S. 1092, 112 L. Ed. 2d 1062 (1991). Here, the trial court granted a recess pursuant to N.C. Gen. Stat. § 15A-910(a)(2). *See* N.C. Gen. Stat. § 15A-910(a)(2). The trial court also made it clear that it was willing to consider other remedies that defendant may request, although it would not dismiss the charges or prohibit the State from introducing the statement. The trial court’s statement upon making its ruling demonstrates that it considered any possible prejudice to defendant and the various possibilities as to remedies and that it was open to consider additional requests from defendant. The trial court did not abuse its discretion by granting a recess in order to provide defendant with an “opportunity to prepare[,]” and the trial court indicated it was more than willing to provide defendant with more time to prepare or take other steps as

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necessary in order to ensure defendant received a fair trial. *See, e.g., State v. McClintick*, 315 N.C. 649, 662, 340 S.E.2d 41, 49 (1986) (“[A]lthough the trial judge did not impose any sanctions for failure to comply with discovery and indeed expressed his displeasure with the state’s tactics with respect to discovery, he did in fact employ several of the curative actions suggested by N.C.G.S. § 15A-910. . . . We fail to find any abuse of discretion.” (citation omitted)). Accordingly, the trial court did not abuse its discretion by granting a recess instead of dismissal of the charges or barring the statement from admission. This argument is overruled.

## III. Sentencing

**[2]** Defendant contends that “the trial court erred in sentencing . . . [him] to more than two consecutive active misdemeanor sentences in violation of North Carolina sentencing statutes, § 15A-1340.22.” (Original in all caps.)

Defendant was determined to have a prior misdemeanor record level of II and was sentenced for his individual convictions of class 1 misdemeanor larceny as follows:

- 07CRS056825—45 days imprisonment, suspended for 60 months of supervised probation, with an **active term of 10 days** as a condition of special probation
- 07CRS056826—**45 days imprisonment**
- 07CRS056830—45 days imprisonment, suspended for 60 months of supervised probation, with an **active term of 10 days** as a condition of special probation
- 07CRS056833—45 days imprisonment, suspended for 60 months of supervised probation, with an **active term of 10 days** as a condition of special probation
- 07CRS056843—45 days imprisonment, suspended for 60 months supervised probation, with an **active term of 10 days** as a condition of special probation
- 07CRS056861—**45 days imprisonment**
- 07CRS056862—45 days imprisonment, suspended for 60 months supervised probation, with an **active term of 10 days** as a condition of special probation.

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- 07CRS058892—45 days imprisonment, suspended for 60 months supervised probation, with an **active term of 10 days** as a condition of special probation

All sentences were ordered to run consecutively. Thus, defendant was sentenced to serve 150 days of active imprisonment, assuming his suspended sentences were never activated, or a total of 360 days if they were activated.

Alleged errors of law are reviewed *de novo*. See *State v. Bare*, — N.C. App. —, —, 677 S.E.2d 518, 522 (2009).

If the court elects to impose consecutive sentences for two or more misdemeanors and the most serious misdemeanor is classified in Class A1, Class 1, or Class 2, the cumulative length of the sentences of imprisonment *shall not exceed twice the maximum sentence authorized for the class and prior conviction level of the most serious offense*. Consecutive sentences shall not be imposed if all convictions are for Class 3 misdemeanors.

N.C. Gen. Stat. § 15A-1340.22(a) (2007) (emphasis added). The maximum sentence for a record level II offender for a class 1 misdemeanor is 45 days. See N.C. Gen. Stat. § 15A-1340.23 (2007). Thus, when reading N.C. Gen. Stat. § 15A-1340.22(a) and -1340.23 in conjunction, “the cumulative length of the sentences of imprisonment” “for two or more misdemeanors” where the most serious is classified as class 1 cannot exceed 90 days. N.C. Gen. Stat. § 15A-1340.22(a), see N.C. Gen. Stat. § 15A-1340.23. Defendant was sentenced to more than 90 days imprisonment which is in plain contravention of N.C. Gen. Stat. § 15A-1340.22(a). See N.C. Gen. Stat. § 15A-1340.22(a).

The State argues that pursuant to N.C. Gen. Stat. § 15A-1351 defendant was properly sentenced because each individual sentence for active time defendant was sentenced to serve as a condition of special probation did “not exceed one-fourth the maximum sentence of imprisonment imposed for the offense[.]” N.C. Gen. Stat. § 15A-1351(a) (2007). While the State is correct that N.C. Gen. Stat. § 15A-1351 was not violated as to the sentences for each individual offense, when defendant is being sentenced for multiple offenses, the sentences must also be in compliance with N.C. Gen. Stat. § 15A-1340.22(a). N.C. Gen. Stat. § 15A-1351(a) does not permit the imposition of active sentences of imprisonment longer in duration than allowed in N.C. Gen. Stat. § 15A-1340.23, entitled “Punishment *limits* for each class of offense and prior conviction level[.]” N.C. Gen. Stat. § 15A-1340.23 (emphasis added), nor does the State direct

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our attention to any law which interprets this statute in such a manner. Accordingly, we remand for resentencing.

**IV. Conclusion**

We conclude that the trial court did not err in denying to exclude defendant's statement or dismiss the charges pending against defendant. However, we do conclude that the trial court erred in sentencing, and therefore remand as to this issue.

NO ERROR; REMAND FOR RESENTENCING.

Judges WYNN and BEASLEY concur.

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STATE OF NORTH CAROLINA v. MICHAEL EUGENE PRICE

No. COA09-336

(Filed 17 November 2009)

**1. Appeal and Error— preservation of issues—constitutional issues—not raised at trial**

Defendants waived constitutional issues involving a juror with reservations about the law by not raising them at trial.

**2. Constitutional Law— right to unanimous jury—investigation of individual juror denied**

Even if defendant had properly preserved the issue for appeal, the trial court did not abuse its discretion by deciding against conducting an investigation with an individual juror who expressed a reluctance to follow the law after deliberations began. Such an action would have resulted in a violation of defendant's right to a unanimous jury.

**3. Criminal Law— *Allen* charge—additional language**

The trial court did not err when giving an *Allen* charge by instructing the jury that it was their duty to do whatever they could to reach a verdict.

Appeal by defendant from judgments entered 14 November 2008 by the Honorable Ronald K. Payne in Jackson County Superior Court. Heard in the Court of Appeals 16 September 2009.

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*Attorney General, Roy Cooper, by Assistant Attorney General Harriet F. Worley, for the State.*

*Appellate Defender, Staples Hughes, by Assistant Appellate Defender Charlesena Elliott Walker, for defendant-appellant.*

STEELMAN, Judge.

Where the defendant failed to object to the trial court's decision not to investigate juror competency, the issue is not preserved for appellate review. The trial court did not err by including in an *Allen* charge the admonition that it was the duty of the jury to do whatever they could to reach a verdict.

I. Factual and Procedural Background

On the night of 25 March 2008, Lisa Carter ("Carter") was awakened by an intruder who covered her face and mouth. A struggle ensued in which Carter passed in and out of consciousness before totally losing consciousness. Carter woke to find herself naked and tied with duct tape and extension cords. By chewing through the tape, she was eventually able to free herself. Her bedroom was in complete disorder with human fecal matter on the bed and floor. At the entrance to her apartment, the security chain on the door had been cut. Carter's purse was also missing.

Carter drove to the home of a friend who contacted emergency services. She was taken to the local hospital and treated for pain and nausea, along with scratches upon her limbs and back.

Carter and defendant had been involved in a romantic relationship at various intervals for a period in excess of one year. Weeks before this incident, the couple broke up once again. As a result of defendant's persistence, Carter attempted to avoid all contact and changed her telephone number on more than one occasion. On the evening of 25 March 2008, Carter spoke to defendant via a pay phone and asked him to leave her alone. Carter's missing purse was found in the woods near the apartment where defendant lived at the time of the crimes.

On 28 July 2008, defendant was indicted on one count of first degree burglary, one count of first degree kidnapping, one count of common law robbery, and one count of assault on a female. The jury returned guilty verdicts on the charges of first degree kidnapping, misdemeanor breaking and entering, common law robbery, and assault on a female on 14 November 2008. Defendant was sentenced

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to an active prison term of 73 to 97 months for his kidnapping conviction. The trial court imposed a suspended sentence of 13 to 16 months for the common law robbery conviction and placed defendant on 36 months supervised probation, to commence at the expiration of defendant's active prison term. The convictions of assault on a female and misdemeanor breaking and entering were consolidated for judgment and defendant was sentenced to 75 days incarceration. This sentence was suspended and defendant was placed on probation to commence at the expiration of his active prison term. Defendant was required to pay restitution and attorney's fees as conditions of his probation. Defendant appeals.

## II. Juror Competency

[1] In his first argument, defendant contends the trial court erred by failing to *ex mero motu* investigate the competency of a juror. We disagree.

During jury deliberations, at 12:15 p.m., the trial court received a hand-written note from a juror. The note stated the juror could not "convict a person on circumstantial evidence alone." Judge Payne advised counsel of the contents of the note, and then stated:

I'm going to tell [the jury] that the law does not require for anyone to be convicted of any crime, that there be direct proof. The law permits a person be convicted on circumstantial evidence. However, the fact that the law allows someone to be convicted on circumstantial evidence does not mean that a juror is compelled to find someone guilty based on circumstantial evidence.

Counsel for the defendant requested that the court reread the portion of jury instructions relating to direct and circumstantial evidence. The trial court denied that request, stating the jury did not ask for such clarification. In addition, Judge Payne stated: "I'm going to reiterate what a reasonable doubt is out of State versus Connor and tell them to continue . . . If you all can think of anything else, I'll do it at that time." Defendant objected to the proposed instruction on reasonable doubt. The trial court instructed the jury and directed them to resume deliberations.

Approximately forty minutes later, the trial court received a second jury note in which a juror stated: "[I] cannot apply the law as explained by the judge's case. I request to be removed from the jury. I would be willing to discuss my concerns with the court." Judge Payne promptly informed the parties and advised that he intended to

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bring the jury into the courtroom and tell them that the law prohibits removing and replacing a juror once deliberations begin. The jury would then be released to go to lunch. After the lunch recess, the trial court proposed to deliver an *Allen* charge<sup>1</sup> to the jury. Counsel for defendant objected to the portion of North Carolina Pattern Jury Instruction 101.40 which read “it is your duty to do whatever you can to reach a verdict.”

Defendant argues the trial court should have made an inquiry into the reason one juror said she could not apply the law. Defendant further asserts that this failure violated his constitutional rights of due process, a fair trial, and constituted an abuse of discretion by the trial court.

Defendant failed to raise these alleged constitutional issues before the trial court, and waived these arguments, which cannot be raised for the first time on appeal. *State v. Mitchell*, 317 N.C. 661, 669, 346 S.E.2d 458, 462 (1986); *Wilcox v. Highway Comm.*, 279 N.C. 185, 187, 181 S.E.2d 435, 437 (1971).

Under N.C. R. App. P. 10(a)(1), “[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make.” *See also Hill v. Hill*, 173 N.C. App. 309, 321, 622 S.E.2d 503, 512 (2005), *disc. review denied and appeal dismissed*, 360 N.C. 363, 629 S.E.2d 852 (2006). Having made no timely request, objection or motion on record that the trial court conduct an investigation with an individual juror, defendant failed to preserve this matter for appeal. This argument is dismissed.

**[2]** Even assuming *arguendo* that this appeal was properly preserved, defendant has a very high burden to overcome. The trial judge’s authority to regulate the composition of the jury continues beyond empanelment. *State v. Kirkman*, 293 N.C. 447, 454, 238 S.E.2d 456, 460 (1977). Our standard of review on appeal in such matters is abuse of discretion, and the trial court’s decision will be upheld unless defendant can show the ruling to be “so arbitrary that it could not have been the result of a reasoned decision.” *State v. Allen*, 322 N.C. 176, 189, 367 S.E.2d 626, 633 (1988).

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1. The *Allen* instruction is a supplemental instruction that is designed to encourage a deadlocked jury to continue deliberations in an attempt to reach a unanimous verdict. *See Allen v. United States*, 164 U.S. 492, 501-02, 41 L. Ed. 2d 528, 530-31. (1896).

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In *State v. Coleman*, 161 N.C. App. 224, 228, 587 S.E.2d 889, 893 (2003), the trial court received a note from the jury stating that one juror was “not following the law” and should be replaced. The trial court advised the jury that a “juror could not be replaced and instructed the jury as to its duty to follow the law.” *Id.* In *Coleman*, we concluded the trial court was not required to perform additional investigation as to the competency of the jury. *Id.* at 229, 587 S.E.2d at 893.

In *State v. Nelson*, 341 N.C. 695, 698-700, 462 S.E.2d 225, 226-27 (1995), the trial court performed an investigation similar to the one now demanded by defendant. In *Nelson*, the judge summoned only the foreperson, asked him questions, and instructed the foreperson not to tamper with evidence in the jury room. *Id.* This practice is recognized as “ill-advised” and “disapproved.” *State v. Tate*, 294 N.C. 189, 198, 239 S.E.2d 821, 827 (1978). Citing the *Nelson* case, our Supreme Court stated in *State v. Wilson*, “[I]t is well established that for the trial court to provide explanatory instructions to less than the entire jury violates the defendant’s constitutional right to a unanimous jury verdict.” — N.C. —, —, 681 S.E.2d 325, 329 (2009).

In his discretion, Judge Payne elected not to conduct an investigation with an individual juror as now posited by defendant. To do so would have resulted in the questioning of a single juror outside the presence of the entire panel. Such action would have resulted in the violation of defendant’s constitutional right to a unanimous jury verdict under *Wilson*. We discern no abuse of discretion in Judge Payne’s handling of this matter.

### III. Allen Charge

[3] In his second argument, defendant contends the trial court committed reversible error by instructing the jury that “it was [their] duty to do whatever [they] could to reach a verdict.” We disagree.

In *Allen v. United States*, the United States Supreme Court upheld a supplemental instruction given to a deadlocked jury that urged jurors to reconsider their opinions and continue deliberation. 164 U.S. at 501-02, 41 L. Ed. 2d at 530-31. Noting that the *Allen* instruction, contained in North Carolina Pattern Jury Instruction 101.40, has been “approved time again,” the trial court instructed the jury as follows:

Now so far I understand you folks have been unable to agree upon a verdict. I want to emphasize to you the fact that it is your

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duty to do whatever you can to reach a verdict. You should reason the matter over together as reasonable men and women and to reconcile your differences, if you can, without the surrender of conscientious convictions, but no juror should surrender his or her honest conviction as to the weight or effect of the evidence solely because of the opinion of his or her fellow jurors or for the mere purpose of returning a verdict. I will now let you return to the jury room and resume your deliberations and see if you can reach a verdict.

Following the reading of the *Allen* charge, defendant renewed his objection to the “whatever you can” language. This issue is thus properly preserved for appellate review.

In *State v. Jones*, 342 N.C. 457, 468, 466 S.E.2d 696, 701, *cert. denied*, 518 U.S. 1010, 135 L. Ed. 2d 1058 (1996), the defendant argued the jury instruction “[t]he Court wants to emphasize the fact that it is your duty to do whatever you can to reach a verdict” was not authorized under N.C. Gen. Stat. § 15A-1235(b)(1). N.C. Gen. Stat. § 15A-1235(b)(1) states: “Jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment.” N.C. Gen. Stat. § 15A-1235(b)(1) (2007). Our Supreme Court found this distinction inconsequential and overruled the assignment of error, approving the language of the *Allen* instruction. *Jones*, 342 N.C. at 468, 466 S.E.2d at 701. *See also State v. Forrest*, 321 N.C. 186, 198-99, 362 S.E.2d 252, 259 (1987); *State v. Bussey*, 321 N.C. 92, 97, 361 S.E.2d 564, 567 (1987).

The decision of the trial court to provide the additional *Allen* instruction was not error. This argument is without merit.

Defendant failed to argue his remaining assignments of error and they are deemed abandoned. N.C.R. App. P. 28(b)(6).

NO ERROR.

Judges McGEE and JACKSON concur.

## CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 17 NOVEMBER 2009)

ALLEN v. ALLEN No. 09-73	Pitt (03CVD2569)	Affirmed in Part, Reversed in Part and Remanded
IN RE: D.A.A., A.M.F. No. 09-863	New Hanover (06JT131) (06JT130)	Affirmed
IN RE A.M. AND J.M. No. 09-591	Chatham (07JT8) (07JT7)	Affirmed
IN RE G.W. No. 09-744	Washington (08J24)	Affirmed
IN RE K.N.M. No. 09-706	Dare (08JT21)	Affirmed
IN RE M.T. No. 09-764	Guilford (06JT317)	Reversed and Remanded
IN RE N.S.H. No. 09-371	Macon (07JB90)	Affirmed
LINDSEY v. LINDSEY No. 08-1475	New Hanover (08CVD2268)	Reversed
ROSE v. FORESTER No. 09-427	Iredell (08CVS1988)	Affirmed
STATE v. BATTLE No. 08-1492	Wayne (07CRS53274)	No Error
STATE v. DIXON No. 09-429	Columbus (07CRS51688) (07CRS51689) (07CRS51687)	No Error
STATE v. GARRETT No. 09-301	Cleveland (04CRS53491)	No Error
STATE v. GILL No. 09-282	Rowan (06CRS54457) (07CRS1557) (06CRS54456)	No Error
STATE v. HARDEN No. 09-476	Mecklenburg (08CRS208251) (08CRS208250)	Affirmed

STATE v. HART No. 09-533	Lenoir (05CRS3697) (05CRS2153)	Reversed and Remanded
STATE v. JOHNSON No. 08-1499	Harnett (07CRS6929) (07CRS6930) (07CRS50864)	No Error
STATE v. LEDERER-HUGHES No. 09-280	Wake (08CRS5029)	No Error
STATE v. MASSEY No. 09-294	Mecklenburg (07CRS38442) (07CRS226975) (07CRS38440) (07CRS226976)	No Error
STATE v. MIRJAH No. 09-192	Wilkes (06CRS50145) (06CRS50113) (06CRS50148) (06CRS50549) (06CRS50146) (06CRS50114) (06CRS50149) (06CRS50551) (06CRS50112) (06CRS50147) (06CRS50115)	Affirmed and remanded
STATE v. OWENS No. 09-332	Wake (07CRS66575) (07CRS57226)	No Error
STATE v. THREATTE No. 09-310	Iredell (06CRS61169)	No Error
STATE v. WILLIAMS No. 09-448	Wilkes (08CRS1681) (08CRS1680)	Affirmed
STATE v. WILLIAMS No. 09-413	Pitt (08CRS51593) (08CRS51706) (08CRS51594) (08CRS51592) (08CRS51700)	No Error
STATE v. WILLIAMS No. 09-354	Columbus (07CRS443)	No Error

**STATE v. WILLIAMS**

[201 N.C. App. 161 (2009)]

STATE OF NORTH CAROLINA v. RODNEY LEVON WILLIAMS, DEFENDANT

No. COA08-1578

(Filed 8 December 2009)

**1. Robbery— use of force—sufficiency of evidence**

The evidence of defendant's use of force in a robbery prosecution was sufficient for the trial court to deny defendant's motion to dismiss where defendant contended that the use of force was a reaction to his failure to perform sexually.

**2. Assault— inflicting serious bodily injury—sufficiency of evidence**

The evidence of serious bodily injury was sufficient for the trial court to deny defendant's motion to dismiss the charge of assault inflicting serious bodily injury.

**3. Indictment and Information— variance with evidence—method of strangulation**

The trial court correctly denied defendant's motion to dismiss a charge of assault by strangulation where defendant contended that there was a fatal variance between the indictment and the testimony in the method of strangulation. There was testimony that indicated no variance; even so, the method of strangulation was surplusage.

**4. Assault— by strangulation—sufficiency of evidence—difficulty breathing not required**

Assault by strangulation does not require proof that the victim had difficulty breathing, and the evidence was sufficient where the victim stated that she felt that defendant was trying to crush her throat, that he put his weight on her neck with his foot, that she thought he was trying to make her unconscious, and that she thought she was going to die.

**5. Kidnapping— first-degree—evidence of removal—sufficient**

The trial court did not err by denying defendant's motion to dismiss charges of first-degree kidnapping where defendant contended that there was insufficient evidence of removal for the purpose of serious bodily injury. The State's evidence was sufficient to show that defendant induced the victim into his car on the pretext of paying her for a sexual act while his intent was to assault her.

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**6. Constitutional Law— double jeopardy—assault inflicting serious injury—assault by strangulation**

Although not raised at trial, the issue of double jeopardy was reviewed under Rule 2 of the Rules of Appellate Procedure where defendant was sentenced for both assault inflicting serious injury and assault by strangulation. Language in N.C.G.S. § 14-32.4(b) indicates that the Legislature intended that a defendant be sentenced only for the higher of the offenses, assault inflicting serious bodily injury, and the case was remanded for resentencing.

**7. Appeal and Error— general objection at trial—basis for objection—apparent from context**

The trial court's decision to admit a victim's testimony to an officer was reviewed on appeal where only a general objection was made by defendant and the trial court overruled the objection without stating grounds, but it was clear from the context that the objection was based on hearsay.

**8. Evidence— hearsay—other evidence—same effect**

There was no prejudice from the admission of hearsay statements by a victim to an officer concerning missing money where other evidence provided sufficient evidence of a taking.

**9. Appeal and Error— plain error review—standard**

Plain error review requires that a different result probably would have been reached but for the error, a higher standard than a reasonable possibility of a different result without the evidence.

**10. Constitutional Law— confrontation clause—admission of hearsay—no prejudice**

Even if defendant had properly asserted plain error in contending that the confrontation clause was violated in the admission of hearsay statements from the victim, it cannot be said that the error affected the result of the trial with respect to this charge.

**11. Robbery— evidence sufficient—taking back money from prostitutes**

The trial court did not err by denying defendant's motion to dismiss a charge of common law robbery against one of several victims where there was substantial evidence of a taking, of force, and of defendant as perpetrator. Defendant's interactions

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with this and other victims clearly indicate that he intended to rob the victims and take back the money he had given them for sex.

**12. Assault— injuries caused by assault—sufficiency of evidence**

The trial court did not err by denying defendant's motion to dismiss a charge of assault inflicting serious bodily injury against this victim where defendant argued that there was insufficient evidence that the victim's injuries were caused by the assault. The nature of the injuries raised a reasonable inference that they were neither accidental nor self-inflicted, and the State was not required to exclude all other possible inferences as to their source.

**13. Assault— deadly weapon inflicting serious injury—sufficiency of evidence—use of hands as weapon**

The trial court did not err by denying defendant's motion to dismiss a charge of assault with a deadly weapon inflicting serious injury where there was sufficient evidence that defendant was the perpetrator and that he used his hands as a deadly weapon.

**14. Sexual Offenses— first-degree—sufficiency of evidence**

The trial court correctly denied defendant's motion to dismiss a charge of first-degree sex offense where defendant had paid the victim for a sexual act and defendant contended that the evidence was not sufficient. A reasonable mind could infer that the victim would not consent to the insertion of an object that would leave a five-inch gash requiring surgery, and the evidence of defendant as the perpetrator of other offenses against the victim was sufficient to support the conclusion that he was the perpetrator of this offense.

**15. Kidnapping— first-degree—sufficiency of evidence—removal—separate from other crimes**

The trial court correctly denied defendant's motion to dismiss a charge of first-degree kidnapping against one of several victims where defendant had paid the victim for a sexual act and then assaulted her. A reasonable mind could easily conclude that taking the victim to a secluded area was a separate transaction designed to reduce his risk of discovery.

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**16. Constitutional Law— double jeopardy—basis of first-degree kidnapping**

There was no double jeopardy violation where defendant argued that second-degree kidnapping was elevated to first-degree kidnapping by a first-degree sexual offense against this victim, for which he was also sentenced. The jury was instructed on first-degree kidnapping based on a serious injury without reference to the sexual assault.

**17. Constitutional Law— double jeopardy—assault and first-degree kidnapping**

There was no double jeopardy violation in sentencing defendant separately for felonious assault and first-degree kidnapping where defendant argued that the assault was used to elevate second-degree kidnapping to first-degree kidnapping. Although the kidnapping instruction required a finding of abduction for the “purpose” of doing serious bodily injury, that is distinct from the actual commission of serious bodily injury required for assault inflicting serious bodily injury.

**18. Assault— continuous transaction with multiple injuries— one assault**

Defendant should have been sentenced only for assault with a deadly weapon inflicting serious injury where the evidence established a continuous transaction with multiple injuries rather than multiple assaults. Assault inflicting serious bodily injury was the lesser offense and that judgment was vacated.

**19. Robbery— sufficiency of evidence—use of force—purpose**

There was sufficient evidence for the trial court to deny defendant’s motion to dismiss the charge of common law robbery where defendant argued that the use of force was in reaction to his failure to perform sexually, but there was evidence that the victim had left her possessions behind as she fled to safety. Moreover, defendant’s statements and actions indicated that he intended to take the victim’s property.

**20. Assault— inflicting serious bodily injury—no substantial risk of death**

The trial court erred by denying defendant’s motion to dismiss the charge of assault inflicting serious bodily injury where the victim received a vicious beating but was not placed at substantial risk of death and there was no evidence of extreme pain.

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**21. Constitutional Law— double jeopardy—separate counts— contemporaneous penetration**

There was no double jeopardy violation where the trial court denied defendant's motion to dismiss one count of first-degree sexual offense where the victim regained consciousness to find defendant's hands in her vagina and rectum. Each act is a separate offense; the occurrence of the acts in a single transaction is irrelevant.

**22. Kidnapping— first-degree—purpose of serious bodily harm—actual injury merely serious**

Defendant's contention that a charge of first-degree kidnapping involving one of several victims should have been dismissed was properly denied, because *inter alia*, there was substantial evidence that defendant's purpose in kidnapping this victim was to do her serious bodily harm, even if he only inflicted serious injury.

**23. Kidnapping— first-degree—elevation from second-degree—basis**

There was no error in the elevation of second-degree kidnapping to first-degree kidnapping where defendant contended that a first-degree sexual offense should not have been used for that purpose. There was no reference to sexual assault in the jury instructions.

**24. Kidnapping— first-degree—basis—assault by strangulation**

There was no double jeopardy violation in the elevation of kidnapping to first-degree kidnapping where a conviction for felonious assault was reversed but assault by strangulation remained. Assault by strangulation is clearly distinct from first-degree kidnapping.

**25. Robbery— purpose of force—evidence sufficient**

The trial court did not err by denying defendant's motion to dismiss a charge of common law robbery in a prosecution involving several victims where defendant argued that the violence to the victim was a reaction against his sexual inadequacy, but the evidence tended to show that he forcibly slammed the victim onto a concrete floor, cracked her head open, and strangled her, after which she lost consciousness and awoke to find that defendant, her money, and her purse were gone.

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**26. Assault— inflicting serious bodily injury—injuries sufficient**

There was sufficient evidence to deny defendant's motion to dismiss the charge of assault inflicting serious bodily injury where the victim sustained a puncture wound to the back of the scalp and a parietal scalp hematoma, and went into premature labor.

**27. Assault— with a deadly weapon inflicting serious injury—defendant's hands**

The trial court did not err by denying a motion to dismiss the charge of assault with a deadly weapon inflicting serious injury where the victim was a small-framed, pregnant, cocaine-addicted woman whom defendant threw to a concrete floor with his hands, cracking open her head. He then put his hands around her neck.

**28. Constitutional Law— double jeopardy—assault with a deadly weapon inflicting serious injury—assault inflicting serious bodily injury**

Defendant should not have been sentenced for both assault with a deadly weapon inflicting serious injury and assault inflicting serious bodily injury, and the later judgment was vacated.

**29. Robbery— common law—causing victim to flee and leave property**

The trial court did not err by denying defendant's motion to dismiss a charge of common law robbery where the State's evidence was that defendant beat the victim, ordered her to remove her clothes, went through her clothing, told her to give him the money he had given her for sex, and told her to run or he would get her. Defendant placed her in such fear as to cause her to flee, leaving the property with him.

Appeal by defendant from judgments entered 25 January 2008 by Judge Benjamin G. Alford in Wayne County Superior Court. Heard in the Court of Appeals 14 September 2009.

*Roy Cooper, Attorney General, by Anne M. Middleton, Assistant Attorney General, for the State.*

*William D. Spence, for defendant-appellant.*

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MARTIN, Chief Judge.

Defendant was charged in bills of indictment in which K.N.J.W.<sup>1</sup> was alleged to be the victim with first degree rape, first degree sex offense, common law robbery, assault inflicting serious bodily injury, assault with a deadly weapon inflicting serious injury, and first degree kidnapping. Defendant was charged in a bill of indictment in which M.L.W. was alleged to be the victim with two counts of first degree sex offense, common law robbery, assault inflicting serious bodily injury, assault by strangulation, and first degree kidnapping. Defendant was charged in a bill of indictment in which K.L.A. was alleged to be the victim with assault by strangulation, common law robbery, assault inflicting serious bodily injury, assault with a deadly weapon inflicting serious injury, and first degree kidnapping. Defendant was charged in a bill of indictment in which L.T. was alleged to be the victim with common law robbery, assault inflicting serious bodily injury, assault by strangulation, and first degree kidnapping. Defendant was charged in a bill of indictment in which C.D.S. was alleged to be the victim with common law robbery and assault on a female. Defendant entered pleas of not guilty to each of the charged offenses.

Upon the State's motion, all of the charged offenses were joined for trial. At the close of the State's evidence, the charge of first degree rape of K.N.J.W. was dismissed; defendant's motions to dismiss the remainder of the charges, made at the close of the State's evidence and at the close of all of the evidence, were denied. A jury rendered verdicts finding defendant not guilty of assaulting K.L.A. by strangulation, and guilty of each of the other offenses with which he was charged. He appeals from judgments entered upon the verdicts, sentencing him to consecutive sentences within the presumptive range totaling a minimum term of 1122 months and a maximum term of 1411 months in the custody of the North Carolina Department of Correction.

Briefly summarized, the State's evidence at trial tended to show that during the period from the cold months of late 2004 or early 2005 to 10 October 2006, defendant picked up five different women, who were apparently working as prostitutes, in Goldsboro, North Carolina. Four of the women, C.D.S., L.T., K.L.A., and M.L.W., testified that defendant negotiated with them for the performance of various

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1. Each of the five alleged victims will be referred to by initials in order to protect their identities.

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sexual acts in exchange for money and drove them to more secluded locations for performance of the acts. The women testified that defendant assaulted them, took the money he had given them and, while they fled or lay unconscious, he absconded with their personal belongings which had been left in his vehicle or at the scene. Defendant's admissions and testimony from witnesses, investigators, and hospital personnel established a similar set of circumstances for the fifth victim, K.N.J.W. We will summarize the evidence with respect to each of the victims in more detail only to the extent necessary to address defendant's assignments of error.

L.T.

The State's evidence with respect to the charges relating to L.T. tended to show that during the cold months of late 2004 or early 2005, L.T. was picked up by a man, whom she identified as defendant, after midnight. They negotiated for a sexual act in exchange for money. They drove to a parking lot. Defendant gave L.T. money and tried to perform the sex act, but could not maintain an erection. Defendant then punched L.T. and told her "this is what I like, bitch" and immediately obtained an erection. Defendant pushed his knee into L.T.'s pelvic bone and pressed against her throat while she was struggling to get away. L.T. managed to get out of the vehicle and defendant grabbed her belongings as they fell out. He asked her, "where's my fucking money, bitch?" L.T. told him the money was in her pants. Then, defendant put his foot on her neck and pressed down with his weight. Defendant put his other foot on L.T.'s rib cage, pushing until she heard her rib pop. A man came out on the porch of a nearby house and asked if L.T. wanted him to call 911. Defendant gathered up L.T.'s belongings and fled.

[1] Defendant contends the trial court erred in denying his motion to dismiss the charge of common law robbery against L.T. In ruling upon a defendant's motion to dismiss in a criminal trial, "the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). Substantial evidence is defined as "relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996). "[S]o long as the evidence supports a reasonable inference of the defendant's guilt," the motion should be denied. *State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009). In addition, "[t]he reviewing court consid-

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ers all evidence in the light most favorable to the State,” *State v. Garcia*, 358 N.C. 382, 412, 597 S.E.2d 724, 746 (2004), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005), and “[a]ny contradictions or discrepancies in the evidence are for the jury to resolve and do not warrant dismissal.” *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992).

“Robbery at common law is the felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence or putting him in fear.” *State v. Black*, 286 N.C. 191, 193, 209 S.E.2d 458, 460 (1974). Defendant appears to concede both that force was used and property was taken, but contends that the force was not used to take the property, but was instead a reaction to his failure to perform sexually. L.T. was severely beaten by defendant until she sought refuge behind a telephone pole, leaving her possessions. Defendant’s grabbing of her possessions and saying “where’s my fucking money, bitch?” indicate his intent to take her property. The evidence shows that the victim was fearful enough of defendant to tell him that the money was in her jeans and to try to escape from his vehicle. In the light most favorable to the State, this shows that defendant intended to take, and did take, by force the money which he had earlier given to L.T. This assignment of error is overruled.

[2] Defendant next contends the trial court erred in denying his motion to dismiss the charge of assault inflicting serious bodily injury. Under N.C.G.S. § 14-32.4(a), this crime requires proof of (1) an assault and (2) infliction of serious bodily injury. *See* N.C. Gen. Stat. § 14-32.4(a) (2007). Under this statute, serious bodily injury is defined as “bodily injury that creates a substantial risk of death, or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization.” *Id.*

Defendant contends the injury inflicted on L.T. was not serious bodily injury, as required by the statute. The evidence showed that as a result of defendant’s assault upon her, L.T. suffered a cracked pelvic bone, a broken rib, torn ligaments in her back, and a deep cut over her left eye. She was also unable to have sex for seven months. The eye injury developed an infection which lingered for months and was never completely cured. The incident left a scar above her eye. The scar amounts to permanent disfigurement. This case is similar to *State v. Downs*, 179 N.C. App. 860, 635 S.E.2d 518, *disc. review dis-*

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*missed and disc. review denied*, 361 N.C. 173, 640 S.E.2d 57 (2006), in which this Court held that the loss of a natural tooth, even one that could be replaced with a dental implant, was enough permanent disfigurement to go to the jury on the issue of serious bodily injury. *Downs*, 179 N.C. App. at 861-62, 635 S.E.2d at 520. L.T.'s injuries were sufficient for a reasonable mind to conclude that she had suffered serious bodily injury. Therefore, we overrule this assignment of error.

[3] Defendant next contends the trial court erred in denying his motion to dismiss the charge of assault by strangulation against L.T. Under N.C.G.S. § 14-32.4(b), the above crime is committed when a person (1) assaults another person (2) and inflicts physical injury (3) by strangulation. N.C. Gen. Stat. § 14-32.4(b).

Defendant first contends the indictment contained a "fatal" variance from L.T.'s testimony at trial. The indictment alleges that defendant strangled L.T. by placing his hands around her throat. Defendant contends L.T. testified that it was his elbow or his foot which was pressed against her neck. "A variance occurs where the allegations in an indictment, although they may be sufficiently specific on their face, do not conform to the evidence actually established at trial." *State v. Norman*, 149 N.C. App. 588, 594, 562 S.E.2d 453, 457 (2002).

L.T. testified that defendant pressed his foot or elbow on her neck. However, while on the witness stand, she also verified that in her statement to Goldsboro Police Investigator Learnard, which was entered into evidence, she had stated that defendant "put his hand upon [her] chest, pushing [her] neck." This testimony indicates there may not have been a variance at all. However, even if L.T.'s testimony was at variance with the allegations of the indictment, defendant's argument would fail because the variance was immaterial and thus not fatal. *State v. Craft*, 168 N.C. 208, 212, 83 S.E. 772, 744 (1914). An indictment based on a statutory offense is usually sufficient if "couched in the language of the statute." *State v. Palmer*, 293 N.C. 633, 638, 239 S.E.2d 406, 410 (1977). "The [indictment] is complete without evidentiary matters descriptive of the manner and means by which the offense was committed." *State v. Lewis*, 58 N.C. App. 348, 354, 293 S.E.2d 638, 642 (1982) (internal quotation marks omitted), *cert. denied*, 311 N.C. 766, 321 S.E.2d 152 (1984). Thus, the method of strangulation was surplusage and should be disregarded. *State v. Taylor*, 280 N.C. 273, 276, 185 S.E.2d 677, 680 (1972).

[4] Defendant next contends that his actions as alleged do not constitute actual strangulation. Defendant contends that in order to con-

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stitute strangulation there must be evidence that the victim had difficulty breathing. Defendant cites *State v. Braxton*, 183 N.C. App. 36, 643 S.E.2d 637, *disc. review denied*, 361 N.C. 697, 653 S.E.2d 4 (2007), for this proposition. However, defendant reads the language of *Braxton* too narrowly. The defendant in *Braxton* also moved to dismiss the charge of assault by strangulation claiming the State had presented insufficient evidence that defendant strangled the victim. *Id.* at 42, 643 S.E.2d at 641. In affirming the trial court's decision denying the motion to dismiss, this Court held the evidence that the victim had been strangled to the point of having difficulty breathing was sufficient to comprise "strangulation" under the statute. *Id.* at 43, 643 S.E.2d at 642. However, the Court did not go as far as to require proof that the victim had difficulty breathing in order to satisfy the statutory requirements.

In her statement to Investigator Learnard, L.T. stated that she felt that defendant was trying to crush her throat, that he pushed down with his weight on her neck with his foot, that she thought he was trying to "chok[e] her out" or make her go unconscious, and that she thought she was going to die. We hold the foregoing evidence is also sufficient evidence of assault by strangulation. Thus, we overrule this assignment of error.

[5] Defendant next contends the trial court erred in denying his motion to dismiss the charges of first degree kidnapping against L.T. Kidnapping is defined in N.C.G.S. § 14-39 as:

(a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:

. . . .

(3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person . . . .

N.C. Gen. Stat. § 14-39(a)(3) (2007). Section (b) of the statute describes the degrees of kidnapping. N.C. Gen. Stat. § 14-39(b). First degree kidnapping occurs "[i]f the person kidnapped either was not released by defendant in a safe place or had been seriously injured or sexually assaulted . . . ." *Id.* Kidnapping can be accomplished either by actual force or by fraud or trickery which "induce[s] the victim to

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be removed to a place other than where the victim intended to be.” *State v. Davis*, 158 N.C. App. 1, 13, 582 S.E.2d 289, 297 (2003).

Defendant contends there was insufficient evidence to show that he confined, restrained, or removed L.T. or that he did so for the purpose of causing her serious bodily injury. The State, however, points us to the similarities in the evidence with respect to L.T., K.N.J.W., M.L.W., and K.L.A., arguing that such evidence, taken together, shows a common plan and scheme by defendant to approach a prostitute, negotiate a sexual act in exchange for money, induce the woman to enter his car and move to a more secluded location, while having the intent to beat the woman, and rob her of her belongings, including the money which he had earlier paid her. In addition, the State argues that defendant’s statements to L.T. after he hit her that “this is what I like, bitch,” and his achieving an erection after hitting her show that defendant knew he desired violence against another person and induced the women to get in his vehicle for that express purpose. We agree. We hold the State’s evidence is sufficient to show that at the time defendant induced L.T. to enter his car on the pretext of paying her money in return for a sexual act, his intent was to assault her. In addition, we hold that a reasonable mind could conclude from the evidence that had L.T. known of such intent, she would not have consented to have been moved by defendant from the place where she first encountered him.

[6] Finally, defendant contends his rights under the Fifth Amendment to the United States Constitution and Article I, Section 19 of the North Carolina Constitution have been violated by sentencing him under both N.C.G.S. § 14-32.4(a) for assaulting L.T. and inflicting serious bodily injury and N.C.G.S. § 14-32.4(b) for assaulting L.T. by strangulation. Defendant did not raise this issue at trial. It is well established that “a constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal.” *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982). Nevertheless, defendant contends the issue is reviewable as “plain error.” Plain error analysis, however, “applies only to instructions to the jury and evidentiary matters.” *State v. Greene*, 351 N.C. 562, 566, 528 S.E.2d 575, 578, *cert. denied*, 531 U.S. 1041, 148 L. Ed. 2d 543 (2000). Since the issue implicates neither jury instructions or evidentiary rulings, it is not properly reviewable as “plain error.”

Finally, defendant urges us to exercise our discretionary powers under Rule 2 of the North Carolina Rules of Appellate Procedure. N.C.R. App. P. 2. Rule 2 is used to suspend the rules of appellate pro-

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cedure in order to “prevent manifest injustice” and has been used to review a case for double jeopardy even when the issue was not raised at trial. *Id.*; *State v. Dudley*, 319 N.C. 656, 659, 356 S.E.2d 361, 364 (1987). Rule 2 discretion should be exercised “cautiously” and only in “exceptional circumstances.” *State v. Hart*, 361 N.C. 309, 315, 644 S.E.2d 201, 205 (2007) (internal quotation marks omitted from second quotation). We choose to exercise this discretionary power to review defendant’s contentions with respect to double jeopardy.

The prohibition against double jeopardy contained in the Fifth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, and which has been deemed a part of the North Carolina Constitution through the “law of the land” provision of Article I, Section 19, prohibits a defendant from receiving multiple punishments for the same offense. *State v. Cameron*, 283 N.C. 191, 197, 195 S.E.2d 481, 485 (1973). “The burden is upon defendant to sustain his plea of double jeopardy.” *State v. Cutshall*, 278 N.C. 334, 343, 180 S.E.2d 745, 750 (1971). We review double jeopardy issues *de novo*. *State v. Hagans*, 188 N.C. App. 799, 804, 656 S.E.2d 704, 707, *disc. review denied*, 362 N.C. 511, 668 S.E.2d 344 (2008).

Defendant contends the language in N.C.G.S. § 14-32.4(b), “[u]nless the conduct is covered under some other provision of law providing greater punishment,” is an indicator of legislative intent to prohibit a court from sentencing a defendant for the same conduct under both N.C.G.S. § 14-32.4(b) and N.C.G.S. § 14-32.4(a) because the former is a Class H felony and the latter is a Class F felony. We agree.

In *State v. Ezell*, 159 N.C. App. 103, 582 S.E.2d 679 (2003), this Court held that legislative intent would rebut the presumption created by *Blockburger v. United States*, 284 U.S. 299, 76 L. Ed. 306 (1932), that two offenses are not considered the same for the purposes of double jeopardy if each offense requires proof of an element that the other does not. *Ezell*, 159 N.C. App. at 109, 582 S.E.2d at 684. In *Ezell*, the Court went on to hold that the language “[u]nless the conduct is covered under some other provision of law providing greater punishment” indicated legislative intent to punish certain offenses at a certain level, but that if the same conduct was punishable under a different statute carrying a higher penalty, defendant could only be sentenced for that higher offense. *Id.* at 111, 582 S.E.2d at 685. This same analysis was used by this Court in *State v. McCoy*, 174 N.C. App. 105, 620 S.E.2d 863 (2005), *supersedes and disc.*

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*review denied*, 628 S.E.2d 8 (2006), to hold that a defendant could not be sentenced for the same conduct under both N.C.G.S. § 14-33(c)(1), which also contains the quoted language, and N.C.G.S. § 14-32(b). *McCoy*, 174 N.C. App. at 116, 620 S.E.2d at 871-72. Thus, even though N.C.G.S. § 14-32.4(a) and (b) require proof of different elements, so as to be distinct crimes under *Blockburger*, the insertion of the quoted language in the statute indicates the intent of the legislature that a defendant only be sentenced for the higher of the two offenses, assault inflicting serious bodily injury. Thus, we must vacate the judgment entered upon defendant's conviction in 06 CRS 57321, count 19. Since that conviction was consolidated with defendant's convictions of common law robbery, assault inflicting serious bodily injury, and first degree kidnapping in 06 CRS 057321, counts 17, 18 and 20, we must remand these convictions to the trial court for resentencing. *State v. Wortham*, 318 N.C. 669, 674, 351 S.E.2d 294, 297 (1987).

K.N.J.W.

With respect to the charges relating to K.N.J.W., the State's evidence tended to show that around 7:45 on the morning of 10 October 2006, K.N.J.W. knocked on the door of Justin Wiggs who lived across from Peacock Park. She was bleeding from her mouth and vaginal area. She told Mr. Wiggs that she had awakened in the park and did not know what had happened to her. Mr. Wiggs called an ambulance, and K.N.J.W. was transported to the hospital. On the way to the hospital, K.N.J.W. told Wayne County EMS employee Kari McCallister that she had been picked up on George Street by an African-American male, and provided a description of the man and the vehicle he was driving. In the meantime, after the ambulance had departed with K.N.J.W., Mr. Wiggs, curious about what had occurred, went to Peacock Park where he encountered a man he identified at trial as defendant. At the hospital, K.N.J.W. told the emergency room nurse that she had been assaulted by the man who picked her up. The nurse collected evidence for a rape kit and bagged K.N.J.W.'s clothes to give to the police department. K.N.J.W. sustained a vaginal laceration, four to five inches in length, and lost nearly a quart of blood by reason thereof. She sustained injuries to her head and face, as well as multiple fractures to her jaw requiring the surgical insertion of titanium bone plates.

Later the same day, Investigator Learnard visited K.N.J.W., who gave her details about the person who had assaulted her. In combination with the information K.N.J.W. had given to Kari McCallister,

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these details led Investigator Learnard to defendant. Investigator Learnard questioned defendant, who initially denied being at the park, but later admitted being in the park and paying K.N.J.W. for oral sex.

**[7]** Defendant's first assignment of error relates to the trial court's admission of a statement by Investigator Learnard. Investigator Learnard testified that when she visited K.N.J.W. in the emergency room, K.N.J.W. stated that when she awoke in the park her bra was hiked up and the money she had placed there was missing. Defendant first contends that this statement was inadmissible hearsay and its admission by the trial court was in error.

At trial, defendant's counsel made only a general objection to the admission of the statement. The trial court overruled the statement without stating grounds and defendant did not ask for clarification of the grounds. Rule 10(b)(1) of the North Carolina Rules of Appellate procedure requires that specific grounds be given for an objection unless the grounds are clear from the context. N.C.R. App. P. 10(b). In the context of the investigator's testimony, it is clear that the objection was made on hearsay grounds. Therefore, we will review the trial court's decision to admit the statement.

**[8]** Hearsay is defined under the North Carolina Rules of Evidence as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, N.C.R. Evid. 801(c) (2007). The statement at issue was "[K.N.J.W.] had stated when she woke up, that her bra was hiked up on one side and her money was missing." K.N.J.W.'s statement was clearly offered to prove the truth of the statement—that the money was missing, and there is no contention by the State that the statement was being offered for any non-hearsay purpose, or that it was admissible under any of the exceptions to the hearsay rule. Thus, the admission of the statement was error.

Nevertheless, defendant must demonstrate prejudice from the erroneous admission of the evidence. N.C. Gen. Stat. § 15A-1442(4)(c) (2007); *State v. Bass*, 190 N.C. App. 339, 348, 660 S.E.2d 123, 129, *cert. denied and appeal dismissed*, 362 N.C. 683, 670 S.E.2d 566 (2008). Defendant contends he was prejudiced because the hearsay statement was the only evidence of a taking to sustain the charge of common law robbery. We disagree. Even without K.N.J.W.'s statement, other evidence provides sufficient evidence of a taking. Defendant

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admitted to Investigator Learnard that he gave K.N.J.W. money in exchange for oral sex and that K.N.J.W. put the money in her bra. Investigator Learnard testified that no money was found at the scene of the crime. A nurse testified that she collected K.N.J.W.'s clothes at the hospital. The inventory of K.N.J.W.'s clothing does not include any money. In addition, a crack pipe with K.N.J.W.'s DNA was found in defendant's car.

Defendant next contends the admission of this statement violated the Confrontation Clause of the United States Constitution. Defendant appears to concede that this constitutional issue was not specifically raised at trial and therefore cannot be reviewed for the first time on appeal. *State v. Chapman*, 359 N.C. 328, 354, 611 S.E.2d 794, 822 (2005). However, defendant argues that this error should be reviewed for plain error. Plain error review requires that defendant show that the error was "so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988).

[9] In his brief discussing plain error review, defendant alleges none of the elements required of him for plain error review. However, in a previous section of his brief, defendant contends that because there was no other evidence of money or property having been taken from K.N.J.W. to support the common law robbery charge "there is a reasonable possibility that, had this testimony not been admitted in evidence, a different result would have been reached at trial." Plain error review, however, requires a higher standard, i.e., that a different result "probably would have been reached but for the error." *State v. Cummings*, 352 N.C. 600, 637, 536 S.E.2d 36, 61 (2000) (internal quotation marks omitted), *cert. denied*, 532 U.S. 997, 149 L. Ed. 2d 641 (2001).

[10] Even had defendant properly asserted plain error, we cannot say that the erroneous admission of Investigator Learnard's hearsay testimony probably affected the result of the trial with respect to the common law robbery of K.N.J.W. As discussed above, there was substantial evidence that a taking occurred. This assignment of error is overruled.

Defendant's next five assignments of error are based on the trial court's denial of his motion to dismiss various charges relating to K.N.J.W.

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[11] Defendant first contends the trial court erred in denying his motion to dismiss the charge of common law robbery against K.N.J.W. Defendant contends the State failed to introduce sufficient evidence that (1) a taking occurred, (2) that force was used to accomplish the taking, and (3) that defendant was the perpetrator.

Defendant argues that the hearsay statement of Investigator Learnard discussed above is the only evidence of a taking, and without it the State's evidence of common law robbery is insufficient. However, in considering a motion to dismiss, "[a]ll evidence actually admitted, both competent and incompetent, which is favorable to the State must be considered." *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 388 (1984). In addition, as discussed above, even without the statement from Investigator Learnard, there was substantial evidence of a taking.

There is also substantial evidence that force was used to take the money from K.N.J.W. The State presented evidence that K.N.J.W. was picked up by someone matching defendant's description at around 8:00 a.m. on the morning of 10 October 2006. There was no evidence that she was injured at that time. By 8:22 a.m., Kari McCallister, with Wayne County EMS, arrived to find K.N.J.W. battered and bleeding from her head and vaginal area.

There is also ample evidence to support a reasonable inference that defendant was the perpetrator. Shoe prints matching defendant's shoes placed him at the scene. Defendant also admitted to investigators that he was with the victim at the scene on the morning in question. A receipt found at the scene bearing his name indicates that he was in the area sometime after 7:35 a.m. on 10 October 2006. A crack pipe with K.N.J.W.'s DNA was found in defendant's vehicle. His description matches that given by the victim to investigators. In addition, defendant was encountered by Justin Wiggs at the scene not long after the events occurred. Defendant also told conflicting stories to investigators. Such evidence can be used to show consciousness of guilt. *State v. Redfern*, 246 N.C. 293, 297-98, 98 S.E.2d 322, 326 (1957).

The present case can be distinguished from such cases as *State v. Holland*, 234 N.C. 354, 67 S.E.2d 272 (1951), and *State v. Murphy*, 225 N.C. 115, 33 S.E.2d 588 (1945), in which the victims were rendered unconscious by the defendants and regained consciousness bereft of their property. *Holland*, 234 N.C. at 356-59, 67 S.E.2d at 273-75; *Murphy*, 225 N.C. at 115, 33 S.E.2d 588. Our Supreme Court, in the

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above cases, held that the mere opportunity for defendants to take the property was not enough to establish common law robbery. *Holland*, 234 N.C. at 359, 675 S.E.2d at 275; *Murphy*, 225 N.C. at 117, 33 S.E.2d at 590.

In *Holland*, the victim was found unconscious in his home seven hours after an attack. *Holland*, 234 N.C. at 356, 67 S.E.2d at 273. When he awoke eight days later in the hospital, he realized some of his property was missing. *Id.* at 358, 67 S.E.2d at 275. Here, K.N.J.W. was picked up by defendant, was paid money to perform oral sex, and lost consciousness. When K.N.J.W. woke up in the park, the money she had been given was missing. All of this occurred sometime between 7:35 a.m. (the time on defendant's receipt found in the dugout) and 8:16 a.m. (when EMS was dispatched). This short period of time distinguishes this case from the facts of *Holland*. In *Murphy* and *Holland*, there was also evidence of other potential suspects. In *Murphy*, other people were around who witnessed the assault and some moved his unconscious body out of the street. *Murphy*, 225 N.C. at 116, 33 S.E.2d at 588. In *Holland*, nine people lived in the victim's home. *Holland*, 234 N.C. at 358, 67 S.E.2d at 275. In the present case, there was no evidence of the presence of any intervening persons. The State's witness Justin Wiggs stated that he went to the park after the ambulance had left with K.N.J.W. He did not see anyone or any cars in the parking lot until he encountered defendant. In addition, in the present case, unlike *Murphy* and *Holland*, defendant was found in possession of some property, the crack pipe, bearing K.N.J.W.'s DNA. Finally, the court in both *Holland* and *Murphy* noted that robbery did not seem to be the motive for the assault. In *Murphy*, the defendants claimed they were trying to disarm the victim who threatened them. *Murphy*, 225 N.C. at 116, 33 S.E.2d at 588-89. In *Holland*, money was left in the victim's cab and on the victim's person. *Holland*, 234 N.C. at 359, 67 S.E.2d at 275. Here, defendant's interactions with K.N.J.W. and the other victims more clearly indicate that he intended to rob the victims and take back the money he had given them. These distinctions establish that defendant had more than a "mere opportunity" to take the victim's property. For the above reasons, we overrule this assignment of error.

[12] Defendant next contends the trial court erred in denying his motion to dismiss the charge of assault inflicting serious bodily injury on K.N.J.W. Defendant argues that the State presented insufficient evidence that K.N.J.W.'s injuries were caused by an assault or that defendant was the perpetrator of the assault against K.N.J.W.

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Defendant does not dispute that K.N.J.W. sustained “serious bodily injury” from the brutal assault, and the evidence of that fact is beyond question. The nature of the injuries themselves give rise to a reasonable inference that they were neither accidental nor self-inflicted, and the State “is not required to exclude all other possible inferences” as to the source of K.N.J.W.’s injuries in order to withstand a motion to dismiss. *Davis*, 158 N.C. App. at 14, 582 S.E.2d at 298.

With regard to the perpetrator’s identity, the same evidence which supports the conclusion that defendant was the perpetrator of the common law robbery on K.N.J.W. supports the conclusion that he perpetrated the assault on K.N.J.W. Therefore, we overrule this assignment of error.

**[13]** Defendant next contends the trial court erred in denying his motion to dismiss the charge of assault with a deadly weapon inflicting serious injury. According to the North Carolina General Statutes, the above crime requires an (1) assault of another person, (2) with a deadly weapon, and (3) infliction of serious injury. *See* N.C. Gen. Stat. § 14-32(b) (2007). Defendant contends that there is insufficient evidence to show that he was the perpetrator of the assault against K.N.J.W. The same evidence which supports the conclusion that defendant committed common law robbery of K.N.J.W. and committed the assault inflicting serious bodily injury supports the conclusion that defendant was the perpetrator of this crime.

Defendant also contends there was insufficient evidence that a deadly weapon was used in his assault upon K.N.J.W. We disagree. This Court has held that an assailant’s hands may be considered a deadly weapon considering the manner in which they were used and relative size and condition of the parties. *State v. Allen*, — N.C. App. —, —, 667 S.E.2d 295, 301 (2008). In the present case, the evidence shows that defendant was a big stocky man, probably larger than K.N.J.W., who was a female and a likely user of crack cocaine. Given the nature of the injuries sustained by K.N.J.W., the location of the assault, the similarity in the evidence of the assault upon K.N.J.W. with an assault on K.L.A. just five days earlier at the same location, we believe the evidence is substantial that defendant used his hands as deadly weapons to assault K.N.J.W. to the point of inflicting serious injury. This assignment of error is overruled.

**[14]** Defendant next contends the trial court erred in denying his motion to dismiss the charge of first degree sex offense. According to

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N.C.G.S. § 14-27.4, first degree sexual offense is committed if a person (1) engages in a sexual act, (2) with another person by force and against her will, and either (3) “[e]mploys or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon” or (4) “inflicts serious personal injury upon the victim or another person.” N.C. Gen. Stat. § 14-27.4 (2007). Defendant argues there is insufficient evidence (1) of the nature of the sexual act which caused the injuries to K.N.J.W., (2) that the sexual assault was against the will of K.N.J.W., or (3) that defendant was the perpetrator of said sexual assault.

The State has presented sufficient evidence that some sexual act caused the injuries to K.N.J.W. A sexual act is defined by statute as “cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person’s body . . . .” N.C. Gen. Stat. § 14-27.1 (2007). Dr. Lies, the operating physician in the emergency room, testified that the laceration in K.N.J.W.’s vagina was likely caused by the insertion of an object, possibly a fist, but not a penis. This meets the statutory definition of a sexual act. Again, the State is not required to rule out all other sources of injury to withstand a motion to dismiss. *Davis*, 158 N.C. App. at 14, 582 S.E.2d at 298.

Defendant also contends there was insufficient evidence to show that K.N.J.W. did not consent to the sexual act. By defendant’s own admission he was only to receive oral sex from K.N.J.W.; she did not consent to having any objects inserted into her vagina. In addition, a reasonable mind could infer that she would not consent to having an object inserted into her vagina which would leave a five-inch gash requiring surgery.

The evidence sufficient to support a conclusion that defendant was the perpetrator of the robbery and other assaults against K.N.J.W. are sufficient to support the conclusion that he also perpetrated this sexual offense against her. This assignment of error is overruled.

**[15]** Defendant next contends that the trial court erred in denying his motion to dismiss the charges of first degree kidnapping of K.N.J.W. As with L.T., defendant again contends there was insufficient evidence to show that he confined, restrained, or removed K.N.J.W. or that he did so for the purpose of causing her serious bodily injury. We reject his argument for the same reasons discussed regarding

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defendant's contentions with respect to the first degree kidnapping charges in which L.T. was alleged to be the victim.

Defendant also contends any restraint or removal of K.N.J.W. was an inherent element of other felonies alleged to have been committed against her. This contention is likewise without merit. When kidnapping and another felony arise out of the same transaction, reviewing courts have examined the actions of the defendant to determine whether the kidnapping was a separate course of action to prevent the hindering of the commission of the other offense. *State v. Newman*, 308 N.C. 231, 239, 302 S.E.2d 174, 181 (1983) (holding that the removal of the victim to a wooded area to rape her was not "inherent in the commission of the crime of rape," but rather "a separate course of conduct designed to remove her from the view of a passerby who might have hindered the commission of the crime"). Here, a reasonable mind could easily conclude that defendant's acts in taking K.N.J.W. to a secluded area was a separate transaction designed to reduce his risk of discovery and hindrance of the crime. These assignments of error are overruled.

[16] Defendant further argues that his commission of first degree sexual offense upon K.N.J.W. was used to elevate the kidnapping charge to first degree kidnapping. Thus, he contends his sentencing for both offenses violates his rights against double jeopardy. His argument must fail because the jury was instructed that to convict defendant of first degree kidnapping of K.N.J.W., it was required to find that the victim was "seriously injured." There was no reference to the sexual assault in the jury instructions. Jurors are presumed to follow the instructions of the trial court. *State v. Tirado*, 358 N.C. 551, 593, 599 S.E.2d 515, 543 (2004), *cert. denied*, 544 U.S. 909, 161 L. Ed. 2d 285 (2005). Thus, we overrule this assignment of error.

[17] Defendant further contends the imposition of separate sentences for both his conviction of felonious assault upon K.N.J.W. and his conviction of first degree kidnapping upon her violates the prohibition of multiple punishments for the same act because his commission of the assault was used to elevate the kidnapping charge to first degree kidnapping.

Under the test outlined in *Blockburger*, two offenses are distinct for the purposes of double jeopardy if they each require proof of an element the other does not. 284 U.S. at 304, 76 L. Ed. at 309. First degree kidnapping contains the additional element of restraint or confinement that is not statutorily required for conviction of

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the offense of assault inflicting serious bodily injury. N.C. Gen. Stat. § 14-39 (2007); N.C. Gen. Stat. § 14-32.4(a) (2007). In order to elevate second degree kidnapping to first degree kidnapping, the jury in this case was required to find that the victim was seriously injured. Assault inflicting serious bodily injury requires additional proof of “serious bodily injury” beyond the “serious injury” needed to prove first degree kidnapping. *State v. Williams*, 150 N.C. App. 497, 503, 563 S.E.2d 616, 619-20 (2002). We note that although the jury charge for kidnapping required a finding that the women were abducted “for the purpose of doing serious bodily injury” which more closely coincides with the charge of assault inflicting serious bodily injury, we conclude that “for the purpose of” and the actual act of committing serious bodily injury are two different elements, the latter being more serious than the former. Thus, defendant’s argument fails and this assignment of error is overruled.

**[18]** Finally, defendant contends the trial court erred in sentencing him for both assaulting K.N.J.W. with a deadly weapon inflicting serious injury and assaulting her inflicting serious bodily injury. We must agree. “In order for a defendant to be charged with multiple counts of assault, there must be multiple assaults. This requires evidence of a distinct interruption in the original assault followed by a second assault.” *McCoy*, 174 N.C. App. at 115, 620 S.E.2d at 871 (citations and internal quotation marks omitted). The evidence in the present case does not establish two separate assaults upon K.N.J.W., rather it establishes multiple injuries resulting from one continuous transaction. Therefore, defendant should have been sentenced only for the greater of the two offenses, assault with a deadly weapon inflicting serious injury. We must therefore vacate the judgment entered upon defendant’s conviction of assault upon K.N.J.W. inflicting serious bodily injury in case 06 CSR 57025, count 3.

M.L.W.

With respect to M.L.W., the State’s evidence tended to show that in early June of 2006, a man, identified as defendant, approached M.L.W. in his vehicle and told her to get inside the car. They negotiated for a sexual act in exchange for money. They drove to a location full of empty lots from flooded-out homes. Defendant gave M.L.W. money and she began to perform the sex act. Defendant was unable to achieve an erection and hit M.L.W. so hard that she fell to the ground. Defendant began kicking M.L.W. in the ribs; then picked her up by her neck and squeezed while he swung her body. She passed out. She woke up with her head under the wheel of defendant’s ve-

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hicle as if he had placed her there. Defendant had his fingers in her vagina and in her rectum. He kept asking her “where’s my money, bitch?” The money had been in M.L.W.’s hand and had fallen out during the beating. Defendant went over to where the money was laying and M.L.W. took this opportunity to flee, leaving her personal property with defendant.

**[19]** Defendant contends the trial court erred in denying his motion to dismiss the charge of common law robbery against M.L.W. He admits the use of force, but denies that the force was used to take M.L.W.’s property. Instead, he claims the violence was a reaction to his inability to sexually perform. In addition, defendant contends there is a lack of evidence to show that he was the one who took the property of M.L.W.

With regard to the force element, the State has presented evidence that defendant punched, kicked, threatened to kill, and strangled M.L.W. until she lost consciousness. When defendant was momentarily distracted, she fled leaving her possessions behind. The force element required for common law robbery requires violence or fear “sufficient to compel the victim to part with his property.” *State v. Sipes*, 233 N.C. 633, 635, 65 S.E.2d 127, 128 (1951), or “to prevent resistance to the taking.” *State v. Sawyer*, 224 N.C. 61, 65, 29 S.E.2d 34, 37 (1944) (internal quotation marks omitted). The force used by defendant was sufficient to compel M.L.W. to part with her possessions, leaving them behind as she fled to safety.

In addition, defendant’s statement, “where’s my money, bitch?,” made to M.L.W. as he was assaulting her, indicates that he intended to take the money from her and provides circumstantial evidence that he did take it. Defendant also went over to where M.L.W.’s property had fallen from her hand, again indicating that he intended to take property from her. After M.L.W. had fled, leaving her property, she watched defendant leave in his vehicle and almost immediately went to retrieve her property and found it missing. In the light most favorable to the State, this evidence is substantial to allow a reasonable mind to draw the conclusion that defendant took M.L.W.’s property. We overrule this assignment of error.

**[20]** Defendant next contends the trial court erred in denying his motion to dismiss the charge of assault inflicting serious bodily injury on M.L.W. Defendant alleges there was insufficient evidence to show that M.L.W. suffered serious bodily injury. This Court has held that N.C.G.S. § 14-32.4(a) was meant to “cover those assaults that are

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especially violent and result in the infliction of extremely serious injuries.” *Williams*, 150 N.C. App. at 503, 563 S.E.2d at 619. Thus, “‘serious bodily injury’ . . . requires proof of more severe injury than the ‘serious injury’ element of other assault offenses.” *Id.* at 503, 563 S.E.2d at 619-20. As noted above, “serious bodily injury” is injury which “creates a substantial risk of death, or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization.” N.C. Gen. Stat. § 14-32.4(a). Serious injury has been defined as an injury which is serious, but falls short of death. *See State v. Jones*, 258 N.C. 89, 91, 128 S.E.2d 1, 3 (1962).

While the State has presented sufficient evidence of “serious injury,” the State has failed to show “serious bodily injury” on the part of M.L.W. While M.L.W. received a vicious beating, the evidence does not show that her injuries placed her at substantial risk of death. Though her ribs were still “sore” five months after the assault, in order to meet the statutory definition, the victim must experience “extreme pain” in addition to the “protracted condition.” N.C. Gen. Stat. § 14-32.4(a); *State v. Brown*, 177 N.C. App. 177, 188, 628 S.E.2d 787, 793-94 (2006). The State presented no evidence of extreme pain. Therefore, the trial court erred in denying defendant’s motion to dismiss the charge of an assault upon M.L.W. inflicting serious bodily injury, and we must reverse his conviction of that offense in Case No. 06 CRS 57321 as contained in count 9 of the bill of indictment.

Defendant next contends the trial court erred in denying his motion to dismiss the charge of assault by strangulation against M.L.W. Defendant claims that he should only be charged with either assault inflicting serious bodily injury or assault by strangulation. We need not address defendant’s contention as we have previously determined that the charge under N.C.G.S. § 14-32.4(a) should have been dismissed.

**[21]** Defendant also contends the trial court erred in denying his motion to dismiss at least one of the charges of first degree sexual offense against M.L.W. and in sentencing him for two counts of first degree sexual offense against M.L.W. He contends his conviction of, and punishment for, two counts of first degree sexual offense for inserting his fingers in her vagina and in her rectum during a single incident violates his double jeopardy rights. We disagree.

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Defendant cites *State v. Laney*, 178 N.C. App. 337, 631 S.E.2d 522 (2006), in support of his contention that he should not be sentenced for both counts of first degree sexual offense. In *Laney*, defendant touched both the victim's breasts and put his hands under her waistband. *Laney*, 178 N.C. App. at 341, 631 S.E.2d at 525. This Court held that there was one single act of touching and not multiple sexual acts. *Id.* However, in *State v. James*, 182 N.C. App. 698, 643 S.E.2d 34 (2007), this Court, in distinguishing *State v. Laney*, stated that as opposed to mere touching, "multiple sexual acts, even in a single encounter, may form the basis for multiple indictments for indecent liberties." *James*, 178 N.C. App. at 705, 643 S.E.2d at 38. Thus, this Court found that a different analytical path should be applied when dealing with "sexual acts" as opposed to touching in the context of charges of indecent liberties. *Id.* This Court subsequently suggested in *State v. Gopal*, 186 N.C. App. 308, 651 S.E.2d 279 (2007), *aff'd per curiam*, 362 N.C. 342, 661 S.E.2d 732 (2008), that this same logic would apply to charges of sexual offense. *Gopal*, 186 N.C. App. at 322 n.7, 651 S.E.2d at 288 n.7 ("If defendant had properly preserved this issue . . . we would affirm. . . . Even when multiple sex acts occur in a 'single transaction' or a short span of time, each act is a distinct and separate offense.").

Defendant attempts to distinguish *Gopal* by stating that in *Gopal* the sexual acts occurred in sequence whereas, in our case, M.L.W. regained consciousness to find defendant's hands in her vagina and her rectum at the same time. However, in neither *Gopal* nor *James* does this Court make noncontemporaneous penetration a requirement to charge defendant with two separate counts of sexual offense or indecent liberties. *See id.*; *James*, 178 N.C. App. at 705, 643 S.E.2d at 38. In fact, this Court in *Gopal* notes that the occurrence of the acts in a "single transaction" is irrelevant. *Gopal*, 186 N.C. App. at 322 n.7, 651 S.E.2d at 288 n.7. We, therefore, overrule this assignment of error.

**[22]** Defendant also contends, for the same reasons as in his argument with respect to L.T., that the charge of first degree kidnapping of M.L.W. should have been dismissed. For the same reasons as previously stated in our discussion of his similar contentions with respect to L.T., we reject his argument. In addition, though we have concluded the charge of assault inflicting serious bodily injury should have been dismissed by reason of the insufficiency of the evidence that the injuries sustained by M.L.W. amount to "serious bodily injury," we believe the evidence was substantial that defendant's pur-

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pose in kidnapping her was to do her serious bodily harm, even if he only inflicted “serious injury” upon her.

**[23]** Defendant further argues that his commission of first degree sexual offense upon M.L.W. was used to elevate the kidnapping charge to first degree kidnapping. However, the jury was instructed with regard to the kidnapping charge that a required element for defendant to be convicted of first degree kidnapping was that the victim had been “seriously injured or not released in a safe place.” There was no reference to the sexual assault in the jury instructions. This assignment of error is overruled.

**[24]** Defendant also contends the charge of kidnapping was elevated to first degree based on the felonious assault, thereby violating double jeopardy. We disagree. As we have reversed defendant’s conviction for assault inflicting serious bodily injury, the assault which we must examine is assault by strangulation. This assault is clearly distinct from the crime of kidnapping in the first degree and thus this assignment of error is overruled.

**K.L.A.**

With respect to the charges in which K.L.A. is alleged to have been the victim, the State’s evidence tended to show on 5 October 2006, K.L.A. was pregnant and working as a prostitute. At approximately 8:00 a.m. on that date, she was approached by a man, identified as defendant, who told her that he wanted oral sex. He took her to Peacock Park. They went to the dugout at the park and defendant gave K.L.A. some money. She attempted to perform the sex act but defendant did not get an erection. He picked up K.L.A. and slammed her down on the concrete floor of the dugout twice. Her head was cracked open and she began to lose consciousness. Defendant put his hands around her neck. When she regained consciousness, defendant and the money were gone. She was bleeding from her head and vaginal area. Later, she went to the emergency room. A few days later, she went into premature labor.

**[25]** Defendant contends the trial court erred in denying his motion to dismiss the charge of common law robbery against K.L.A., arguing the evidence was insufficient to show that the force which he used was for the purpose of taking K.L.A.’s property. He contends the violence was a reaction to his inability to achieve an erection, and that there was insufficient evidence to show that he was the person who took K.L.A.’s property.

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Taken in the light most favorable to the State, the evidence tends to show that defendant forcibly slammed K.L.A. onto the concrete floor of the dugout, cracked her head open, and strangled her, after which she lost consciousness and awoke to find defendant and her money gone. Her purse, which had been in defendant's vehicle, was gone as well. This evidence is adequate for a reasonable mind to draw the conclusion that defendant took K.L.A.'s property by the use of force. This assignment of error is overruled.

**[26]** Defendant next contends the trial court erred in denying his motion to dismiss the charge of assault inflicting serious bodily injury on K.L.A. We believe the State's evidence with respect to the injuries inflicted upon K.L.A. is substantial to show the infliction of serious bodily injury as defined by N.C.G.S. § 14-32.4(a). K.L.A. sustained a puncture wound to the back of her scalp and a parietal scalp hematoma. Additionally, she went into premature labor as a result of the attack. This was sufficient evidence for a reasonable mind to conclude that she was placed at substantial risk of death and suffered serious bodily injury within the definition of N.C.G.S. § 14-32.4(a). This assignment of error is overruled.

**[27]** Defendant next contends the trial court erred in denying his motion to dismiss the charge of assaulting K.L.A. with a deadly weapon inflicting serious injury. As he did with respect to K.N.J.W., defendant contends that there was insufficient evidence that a deadly weapon was used in the assault. Again, we disagree.

K.L.A. was a small-framed, pregnant woman with a cocaine addiction. She testified that defendant used his hands to throw her onto the concrete floor, cracking her head open. Defendant also put his hands around her neck. Defendant's attacks on K.L.A. using his hands, or his hands in combination with the concrete floor, would be adequate to allow a reasonable mind to draw the conclusion that defendant's hands were used as a deadly weapon in the assault. This assignment of error is overruled.

Defendant assigns error to the denial of his motion to dismiss the charge of first degree kidnapping of K.L.A. For the same reasons discussed regarding his similar contention with respect to such charge in which L.T. was alleged to be the victim, we reject his contentions and find no error in the submission of such charge to the jury.

Defendant also contends the felonious assault was used to elevate the kidnapping charge to first degree in violation of double jeop-

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ardy. However, as discussed in the case of K.N.J.W., the two offenses each contain an additional element that the other does not. Thus, we overrule this assignment of error.

**[28]** Finally, defendant contends the trial court erred in sentencing him for both assaulting K.L.A. with a deadly weapon inflicting serious injury and assaulting her inflicting serious bodily injury. The State concedes that defendant should only have been sentenced for one of the above crimes under *State v. Ezell*, 159 N.C. App. 103, 111, 582 S.E.2d 679, 685 (2003) (holding that a conviction and sentence for both assault with a deadly weapon inflicting serious injury and assault inflicting serious bodily injury for the same conduct was a violation of double jeopardy). Thus, we must vacate the judgment entered upon defendant's conviction of assaulting K.L.A. inflicting serious bodily injury in 06 CSR 57321, count 14.

C.D.S.

With respect to the charges in which C.D.S. is alleged to be the victim, the State's evidence tended to show that on 25 May 2006 C.D.S. was working as a prostitute on the corner of George Street. Defendant stopped his vehicle there and told C.D.S. to get in. C.D.S. got into defendant's vehicle and defendant drove her into some woods. Defendant gave C.D.S. money which she placed in her bra and she began to perform a sex act. When the sexual act was finished, defendant began punching C.D.S. He ordered her to take her clothes off, which she did. She feared she would die. He went through her clothes and then told her to run. She fled and defendant left in his vehicle.

**[29]** Defendant contends the trial court erred in denying his motion to dismiss the charge of common law robbery against C.D.S. because he argues there was insufficient evidence that he took C.D.S.'s property. His argument has no merit. The State's evidence shows that after beating C.D.S. and ordering her to remove her clothes, he went through her clothing and told her to give him the money he had given her earlier. He then told her to run or he would "get her." The evidence was sufficient to show that defendant placed C.D.S. in such fear as to cause her to flee leaving the property with him. This assignment of error is overruled.

## CONCLUSION

We have carefully examined defendant's remaining assignments of error and conclude that they have been abandoned pursuant to

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N.C.R. App. P. 28(b)(6) (2009) (amended Oct. 1, 2009). For the reasons stated above, we must vacate defendant's conviction of assaulting K.L.A. inflicting serious injury in 06 CSR 57321, count 14; defendant's conviction of assaulting L.T. by strangulation in 06 CSR 57321, count 19; and defendant's conviction of assaulting K.N.J.W. inflicting serious bodily injury in 06 CSR 57025, count 3. Defendant's conviction of assaulting M.L.W. inflicting serious bodily injury in 06 CSR 57321, count 9 is reversed. Cases 06 CSR 57321, counts 17, 18 and 20 are remanded for resentencing. As to all of the remaining counts, we find no error.

07 CRS 7397	1	No error.
06 CRS 57320	2	No error.
06 CRS 57025	3	Vacated.
06 CRS 57025	4	No error.
06 CRS 57320	5	No error.
06 CRS 57321	6-7	No error.
06 CRS 57321	8	No error.
06 CRS 57321	9	Reversed.
06 CRS 57321	10	No error.
06 CRS 57321	11	No error.
06 CRS 57321	13	No error.
06 CRS 57321	14	Vacated
06 CRS 57321	15	No error.
06 CRS 57321	16	No error.
06 CRS 57321	17	Remanded for resentencing.
06 CRS 57321	18	Remanded for resentencing.
06 CRS 57321	19	Vacated.
06 CRS 57321	20	Remanded for resentencing.

No error. Judges HUNTER and BRYANT concur.

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[201 N.C. App. 190 (2009)]

STATE OF NORTH CAROLINA v. DOUGLAS DWAYNE WHITAKER, DEFENDANT

No. COA08-1406

(Filed 8 December 2009)

**1. Firearms and Other Weapons— possession of firearm by felon—constitutionality—preservation of public peace and safety**

N.C.G.S. § 14-415.1, which prohibits the possession of firearms by convicted felons, was constitutional as applied to defendant because it was a reasonable regulation that prohibited a convicted felon who violated the law on numerous occasions from possessing firearms in order to preserve public peace and safety.

**2. Appeal and Error— preservation of issues—issue decided in prior case**

Our Court of Appeals has previously concluded that N.C.G.S. § 14-415.1, which prohibits the possession of firearms by convicted felons, does not violate the prohibition against *ex post facto* laws and is not an unconstitutional bill of attainder.

**3. Sentencing— possession of firearm by felon—multiple convictions improper**

Defendant should have been charged with only one violation of N.C.G.S. § 14-415.1, instead of eleven, and the convictions for which defendant received arrested judgments were reversed.

Judge ELMORE concurring in part and dissenting in part.

Appeal by defendant from judgments entered on or about 10 June 2008 by Judge Lindsay R. Davis, Jr. in Superior Court, Moore County. Heard in the Court of Appeals 22 April 2009.

*Attorney General Roy A. Cooper, III, by Assistant Attorney General E. Michael Heavner, for the State.*

*The Law Office of Bruce T. Cunningham, Jr., by Bruce T. Cunningham, Jr. and Amanda S. Zimmer, for defendant-appellant.*

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STROUD, Judge.

Defendant was convicted by a jury of eleven counts of possession of a firearm by a felon. Defendant appeals on various constitutional grounds, primarily arguing that the recent decision of the United States Supreme Court, *District of Columbia v. Heller*, 554 U.S. —, 171 L.E. 2d 637 (2008), requires this Court to hold that North Carolina's law prohibiting possession of firearms by convicted felons violates defendant's individual right to keep and bear firearms under the Second Amendment of the United States Constitution and Article I, Section 30 of the North Carolina Constitution. As we conclude that *Heller* has no effect upon the level of scrutiny which this Court has traditionally applied to regulations of the possession of firearms, we reject defendant's claim that *Heller* requires us to hold that N.C. Gen. Stat. § 14-415.1 is unconstitutional under either the Second Amendment or Article I, Section 30. We further reject defendant's contentions that N.C. Gen. Stat. § 14-415.1 is unconstitutional on any other grounds. However, because defendant should have been charged with only one violation of N.C. Gen. Stat. § 14-415.1, instead of eleven, we reverse the convictions for which defendant received arrested judgments. We find no error as to defendant's single conviction upon which he was sentenced and imprisoned.

**I. Background**

The State's evidence tended to show that on or about 27 June 2005, Detective Sergeant George K. Dennis, a detective with the Moore County Sheriff's Office, saw some guns at defendant's residence. Detective Sergeant Dennis told defendant he could not have guns in his residence and informed defendant that

[t]here had been a change of State law on December 1st of 2004. Up until that point convicted felons could keep long rifles and—and shotguns inside their residence. This was several months afterwards and we were just going—giving him the benefit of the doubt that maybe he didn't know about it and gave him a warning to remove the weapons from his—from his residence.

On 11 April 2006, Officer Connie Burns, a probation and parole officer in Moore County, discussed with defendant "that he was not to have firearms in [his] residence."

On 27 April 2006, Detective Sergeant Dennis, Officer Burns, Detective Sergeant John Andrew Conway, and one other detective sergeant searched defendant's residence. The law enforcement offi-

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cials found “eleven rifles and shotguns in the gun cabinet in the defendant’s bedroom.” Detective Sergeant Conway told defendant “to come to the sheriff’s office on May 8th at a scheduled time to have himself served with the warrants.” On May 8th, defendant turned himself in at the sheriff’s office.

On or about 9 April 2007, defendant was indicted for eleven counts of possession of a firearm by a felon. The indictments were based upon defendant’s 22 April 1988 conviction for possessing cocaine. However, defendant has also had prior felony convictions for indecent liberties with a minor on 24 August 1989 and possessing cocaine on 27 June 2005. On 21 November 2007, defendant filed a motion to dismiss his indictments based on various constitutional grounds; defendant also filed motions to dismiss and consolidate indictments requesting that “all the . . . indictments but one [be dismissed], and that the State be permitted to amend the remaining indictment to include the additional weapons.” Defendant’s motions to dismiss and consolidate were denied.

On or about 10 June 2008, a jury found defendant guilty on all eleven counts. The trial court determined that defendant had a prior record level of five and sentenced him to 18 to 22 months imprisonment on one count, but arrested judgment on the other ten counts. Defendant appeals, claiming N.C. Gen. Stat. § 14-415.1 is unconstitutional both on its face and as applied to him.

**II. Standard of Review**

“The standard of review for questions concerning constitutional rights is *de novo*. Furthermore, when considering the constitutionality of a statute or act there is a presumption in favor of constitutionality, and all doubts must be resolved in favor of the act.” *Row v. Row* 185 N.C. App. 450, 454-55, 650 S.E.2d 1, 4 (2007) (citations, quotation marks, and ellipses omitted), *disc. review denied*, 362 N.C. 238, 659 S.E.2d 741, *cert. denied*, — U.S. —, 172 L. Ed. 2d 39 (2008).

**III. Right to Bear Arms**

[1] Defendant first claims that his individual right to keep and bear arms under the Second and Fourteenth Amendments of the United States Constitution and under Article I, Section 30 of the North Carolina Constitution is a fundamental right that has been violated because N.C. Gen. Stat. § 14-415.1 prohibits him from keeping firearms in his home. Defendant challenges N.C. Gen. Stat. § 14-415.1 both facially and as applied.

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## A. Facial Challenge to N.C. Gen. Stat. § 14-415.1

Defendant's primary argument is that we must reexamine the holding of *Britt v. State*, 185 N.C. App. 610, 649 S.E.2d 402 (2007) upholding the constitutionality of N.C. Gen. Stat. § 14-415.1 in light of *District of Columbia v. Heller*, which held "that the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense." 554 U.S. —, —, 171 L.E. 2d 637, 683 (2008). Defendant contends that pursuant to *Heller*, any restriction of his "fundamental" right to keep and bear arms must now withstand strict scrutiny.

## 1. Standard of Review for a Facial Challenge to N.C. Gen. Stat. § 14-415.1

A heavy burden is imposed upon a party who attempts to make a facial challenge to a statute's constitutionality:

A facial challenge to a legislative act is, of course, the most difficult challenge to mount successfully. . . . An individual challenging the facial constitutionality of a legislative act must establish that no set of circumstances exists under which the act would be valid. The fact that a statute might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid.

*State v. Thompson*, 349 N.C. 483, 491, 508 S.E.2d 277, 281-82 (1998) (citations, quotation marks, and brackets omitted).

Our Supreme Court has stated that "[w]e seldom uphold facial challenges because it is the role of the legislature, rather than this Court, to balance disparate interests and find a workable compromise among them. This Court will only measure the balance struck in the statute against the minimum standards required by the constitution." *Beaufort County Bd. of Educ. v. Beaufort County Bd. of Comm'rs*, — N.C. —, —, S.E.2d —, (Aug. 28, 2009) (No. 106PA08) (citations omitted).

2. *Britt v. State*

However, though defendant contends we should reexamine *Britt v. State*, 185 N.C. App. 610, 649 S.E.2d 402 (2007), the North Carolina Supreme Court has recently reversed that opinion, though not unequivocally in defendant's favor. *See Britt v. State*, — N.C. —,

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681 S.E.2d 320 (2009). In *Britt*, plaintiff Mr. Britt challenged the constitutionality of N.C. Gen. Stat. § 14-415.1 as amended in 2004 by filing a declaratory judgment action against the State, requesting in part that the court grant “declaratory relief by declaring the N.C.G.S. § 14-415.1, as amended by 2004 N.C. Sess. Law, c. 186, s. 14.1, unconstitutional and enjoining the Defendants from in any manner interfering with Plaintiff’s right to purchase, own, possess, or have in his custody, care or control any firearm[.]” The trial court granted summary judgment in favor of the State, concluding, in pertinent part, that “N.C. Gen. Stat. § 14-415.1 is constitutional on its face and as applied to the Plaintiff.”

On appeal, Mr. Britt argued that

the trial court erred by concluding the 1 December 2004 version of N.C. Gen. Stat. § 14-415.1 is constitutional. Specifically, plaintiff contend[ed] N.C.G.S. § 14-415.1 (2004) sweeps too broadly and is not reasonably related to a legitimate government interest. Plaintiff argue[d] that because he was not convicted of a violent felony and because his conviction is so far in the past, the statute prohibiting all convicted felons from possessing any type of firearm is unconstitutional.

*Britt v. State*, 185 N.C. App. 610, 613, 649 S.E.2d 402, 405 (2007), *rev’d and remanded by Britt v. State*, — N.C. —, 681 S.E.2d 320 (2009).

The majority of the Court of Appeals rejected Mr. Britt’s arguments and determined that N.C. Gen. Stat. § 14-415.1, and specifically the 2004 amendment to the statute, was constitutional. *Id.*, 185 N.C. App. at 613-18, 649 S.E.2d at 405-08. However, Judge Elmore dissented, noting that he would hold N.C. Gen. Stat. § 14-415.1 as amended in 2004 facially unconstitutional. *Id.*, 185 N.C. App. at 619-21, 649 S.E.2d at 409-10 (Elmore, J., dissenting). Judge Elmore explained that

[t]he major differences between the 1995 and current versions of the statute lead me to conclude that the statute in its current form is no longer a reasonable regulation. Instead, I would hold that the current statute operates as an outright ban, completely divesting plaintiff of his right to bear arms without due process of law.

In enacting the 2004 amendment, the legislature simply overreached. Thereafter, the statute operated as a punishment, rather

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than a regulation. Moreover, the statute as amended stripped plaintiff of his constitutional right to bear arms without the benefit of due process.

*Id.*, 185 N.C. App. at 621, 649 S.E.2d at 410 (Elmore, J., dissenting) (citation omitted).

Mr. Britt appealed to the North Carolina Supreme Court and presented numerous issues, including, *inter alia*, whether N.C. Gen. Stat. § 14-415.1 violated of the right to keep and bear arms under Article I, Section 30 of the North Carolina Constitution and the effect of *District of Columbia v. Heller*, 554 U.S. —, 171 L.E. 2d 637 (2008). The Supreme Court chose to address only a single issue: “Whether the application of the 2004 amendment to N.C.G.S. § 14-415.1 to plaintiff violates his rights under N.C. Const. art. I, § 30.” *Britt*, — N.C. at —, 681 S.E.2d at (quotation marks omitted). The Supreme Court emphatically declined to address the numerous other issues presented before it, including the facial challenge to N.C. Gen. Stat. § 14-415.1. *Id.*, — N.C. at —, 681 S.E.2d at —. Furthermore, the Supreme Court did not address the proper scrutiny level for considering an individual’s right to keep and bear arms. *Id.*, — N.C. at —, 681 S.E.2d at — n.2 (“Because we hold that application of N.C.G.S. § 14-415.1 to plaintiff is not a reasonable regulation, we need not address plaintiff’s argument that the right to keep and bear arms is a fundamental right entitled to a higher level of scrutiny.”). The Supreme Court ultimately decided only “that N.C.G.S. § 14-415.1 is an unconstitutional violation of Article I, Section 30 of the North Carolina Constitution *as applied to this plaintiff*.” *Id.*, — N.C. at —, 681 S.E.2d at — (emphasis added).

Thus, in summary, although defendant has argued that we must reexamine our own opinion in *Britt* due to *Heller*, by extension defendant argues that we must reconsider the many prior cases of this Court and the Supreme Court which use the rational basis test to evaluate regulations of firearms. Furthermore, the Supreme Court reversed this Court’s opinion which had determined that N.C. Gen. Stat. § 14-415.1 was constitutional; however, the Supreme Court specifically declined to hold that N.C. Gen. Stat. § 14-415.1 is unconstitutional on its face. *See id.*, — N.C. —, 681 S.E.2d —. In sum, we now must venture to navigate the strait presented by this case, between the Scylla of relying upon a reversed case and the Charybdis of holding a statute unconstitutional on its face, when our Supreme Court declined to so hold.

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## 3. Article I, Section 30

The North Carolina Supreme Court has previously reviewed the history of Article I, Section 30:

It is obvious that the second amendment to the Federal Constitution—"A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed"—furnished the wording for the first part of the N.C. Constitution, Art. I § 24. Historical data and the reports of the deliberations and discussions which resulted in the wording of the second amendment and similar provisions in the constitutions of the original states lead to the conclusion that the purpose of these declarations (that a well regulated militia is necessary to the security of a free state) was to insure the existence of a state militia as an alternative to a standing army. Such armies were regarded as " 'peculiarly obnoxious in any free government.' " The framers of our constitutions were dedicated to the principle that the military should be kept under the control of *State v. civil power*. . . .

*State v. Dawson*, 272 N.C. 535, 545, 159 S.E.2d 1, 9 (1968) (citation omitted).

At the time *State v. Huntley* was decided [in 1843], the constitutional provision with reference to the right of the people to bear arms was contained in section 17 of the Bill of Rights, which was a part of our Constitution of 1776. It read as follows: "That the people have a right to bear arms for the defence of the state; and as standing armies, in time of peace, are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to, and governed by, the civil power."

In 1868, the above provision was replaced by the first sentence of Art. I § 24 of the present Constitution: "A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed; and, as standing armies in time of peace are dangerous to liberty, they ought not to be kept up, and the military should be kept under strict subordination to, and governed by, the civil power." To the foregoing, the Constitutional Convention of 1875 added a second sentence: "Nothing herein contained shall justify the practice of carrying concealed weapons, or prevent the Legislature from enacting penal statutes against said practice."

*Id.* at 545, 159 S.E.2d at 8-9.

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Thus, Article I, Section 30 currently provides as follows:

A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed; and, as standing armies in time of peace are dangerous to liberty, they shall not be maintained, and the military shall be kept under strict subordination to, and governed by, the civil power. Nothing herein shall justify the practice of carrying concealed weapons, or prevent the General Assembly from enacting penal statutes against that practice.

N.C. Const. art. I, § 30. The first phrase of Article I, Section 30, which was adopted in 1868, *see Dawson* at 545, 159 S.E.2d at 9, is exactly the same as the Second Amendment to the United States Constitution, except for punctuation. *Compare* U.S. Const. amend. II; N.C. Const. art. I, § 30. Furthermore, the individual right to keep and bear arms under Article I, Section 30 is the same or perhaps even a greater individual right than that as recognized under the Second Amendment. *See State v. Fennel*, 95 N.C. App. 140, 143, 382 S.E.2d 231, 233 (1989).

It is true, however, that the North Carolina Constitution has been interpreted to guarantee a broader right to individuals to keep and bear arms. North Carolina decisions have interpreted our Constitution as guaranteeing the right to bear arms to the people in a collective sense—similar to the concept of a militia—and also to individuals. Yet, as the Supreme Court of this state also noted, [t]hese decisions have consistently pointed out that the right of individuals to bear arms is not absolute, but is subject to regulation. The regulation must be reasonable and not prohibitive, and must bear a fair relation to the preservation of the public peace and safety.

*Fennell* at 143, 382 S.E.2d at 233 (citations, quotation marks, and ellipses omitted).

Defendant contends that he has an individual right to keep and bear arms under Article I, Section 30 of the North Carolina Constitution which provides “a broader right to individuals to keep and bear arms.” *Id.* Due to the “broader” individual right to keep and bear arms under Article I, Section 30, *id.*, we need only consider the North Carolina Constitution and not attempt to determine under *Heller* the full extent of the individual right under the Second Amendment to keep and bear arms or whether the protections of the

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Second Amendment are applicable to the states by incorporation through the Fourteenth Amendment. However, because the Second Amendment and Article I, Section 30 are worded the same in pertinent part, we must carefully consider whether *Heller's* holding and rationale should change the analysis this Court must apply to N.C. Gen. Stat. § 14-415.1 under Article I, Section 30. *See* U.S. Const., amend II; N.C. Const. art. I, § 30.

The right to keep and bear arms afforded by the North Carolina Constitution is subject to regulations which are “reasonable and not prohibitive” and which “bear a fair relation to the preservation of the public peace and safety.” *Fennell* at 143, 382 S.E.2d at 233 (citation and quotation marks omitted). The rational basis standard for review of regulations upon the right to keep and bear arms has been articulated by North Carolina courts since at least 1921. *See State v. Kerner*, 181 N.C. 574, 579, 107 S.E. 222, 226 (1921) (Allen, J., concurring) (“The right to bear arms, which is protected and safeguarded by the Federal and State constitutions, is subject to the authority of the General Assembly, in the exercise of the police power, to regulate, but the regulation must be reasonable and not prohibitive, and must bear a fair relation to the preservation of the public peace and safety.”); *see generally Rhyne v. K-Mart Corp.*, 358 N.C. 160, 180, 594 S.E.2d 1, 15 (2004) (“[T]he rational basis test or rational basis review applies, and this Court must inquire whether distinctions which are drawn by a challenged statute bear some rational relationship to a conceivable legitimate governmental interest.” (citation, quotation marks, and ellipses omitted)). Our Supreme Court recently noted the rational basis standard in *Britt*: “This Court has held that regulation of the right to bear arms is a proper exercise of the General Assembly’s police power, but that any regulation must be at least reasonable and not prohibitive, and must bear a fair relation to the preservation of the public peace and safety.” *Britt*, — N.C. at —, 681 S.E.2d at — (citation and quotation marks omitted).

## 4. N.C. Gen. Stat. § 14-415.1

N.C. Gen. Stat. § 14-415.1(a) provides,

It shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm or any weapon of mass death and destruction as defined in G.S. 14-288.8(c). For the purposes of this section, a firearm is (i) any weapon, including a starter gun, which will or is designed to or may readily be converted to expel a pro-

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jectile by the action of an explosive, or its frame or receiver, or (ii) any firearm muffler or firearm silencer. This section does not apply to an antique firearm, as defined in G.S. 14-409.11.

N.C. Gen. Stat. § 14-415.1(a) (2007).

In *Britt*, this Court determined that N.C. Gen. Stat. § 14-415.1 bore a rational relation “to a legitimate state interest” and was therefore constitutional on those grounds. *Britt*, 185 N.C. App. at 614, 649 S.E.2d at 406. The Supreme Court reversed this Court’s decision in *Britt*, but limited its holding to an as-applied challenge to the constitutionality of the 2004 amendment to N.C. Gen. Stat. § 14-415.1, which expanded “the prohibition on possession to all firearms by any person convicted of any felony, even within the convicted felon’s own home and place of business.” *Id.*, — N.C. at —, 681 S.E.2d at — (citation omitted).

Our Supreme Court reviewed the history of N.C. Gen. Stat. § 14-415.1 in *Britt* as follows:

[In 1987], N.C.G.S. § 14-415.1 only prohibited the possession of “any handgun or other firearm with a barrel length of less than 18 inches or an overall length of less than 26 inches” by persons convicted of certain felonies, mostly of a violent or rebellious nature, “within five years from the date of such conviction, or unconditional discharge from a correctional institution, or termination of a suspended sentence, probation, or parole upon such conviction, whichever is later.”

Subsequently, in 1995 the General Assembly amended N.C.G.S. § 14-415.1 to prohibit the possession of such firearms by all persons convicted of any felony, without regard to the date of conviction or the completion of the defendant’s sentence. The 1995 amendment did not change the previous provision in N.C.G.S. § 14-415.1 stating that “nothing therein would prohibit the right of any person to have possession of a firearm within his own house or on his lawful place of business.” However, in 2004 the General Assembly amended N.C.G.S. § 14-415.1 to extend the prohibition on possession to all firearms by any person convicted of any felony, even within the convicted felon’s own home and place of business.

*Id.*, — N.C. at —, 681 S.E.2d at — (citations and brackets omitted).

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5. *District of Columbia v. Heller*

Defendant argues that *Heller* requires this Court to examine the restriction upon his right to keep and bear arms under strict scrutiny and that under the strict scrutiny analysis the 2004 amendment to N.C. Gen. Stat. § 14-415.1 is unconstitutional. However, defendant's arguments pursuant to *Heller* fail for several reasons.

First, we are not bound by decisions of the United States Supreme Court as to construction of North Carolina's constitution. *State v. Jackson*, 348 N.C. 644, 648, 503 S.E.2d 101, 104 (1998) ("In construing the North Carolina Constitution, this Court is not bound by the decisions of federal courts, including the United States Supreme Court." (citation omitted)). Secondly, *Heller* did not adopt a strict scrutiny standard, or indeed any specific standard, for review of laws regulating the right of an individual to keep and bear firearms.<sup>1</sup>

Third, even assuming *arguendo* that we are bound to interpret our constitution pursuant to United States Supreme Court cases and that *Heller* established strict scrutiny as the applicable level of scrutiny to be applied to regulations of an individual's right to keep and bear arms, we *still* cannot read *Heller* as extending an unqualified right to keep and bear arms to convicted felons. *See Heller* at —, 171 L.E. 2d at 678. *Heller* provides,

Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any man-

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1. However, *Heller* did imply that rational basis scrutiny is not appropriate. *See Heller* at —, 171 L.E. 2d at 679 n.27. In footnote 27, Justice Scalia stated that "Justice Breyer correctly notes that this law, like almost all laws, would pass rational-basis scrutiny. But rational-basis scrutiny is a mode of analysis we have used when evaluating laws under constitutional commands that are themselves prohibitions on irrational laws. In those cases, 'rational basis' is not just the standard of scrutiny, but the very substance of the constitutional guarantee. Obviously, the same test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms. If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect." *Id.* (citations omitted). In turn, Justice Breyer's dissent "criticizes [the majority] for declining to establish a level of scrutiny for evaluating Second Amendment restrictions." *Id.* at —, 171 L. Ed. 2d at 682; *see also State v. Hunter*, 195 P.3d 556, 563 (Wash. App. 2008) ("It is true that, pursuant to *Heller*, a restriction on the right to bear arms must meet a stricter standard of judicial review than 'rational-basis scrutiny,' (although exactly what standard must be met remains unclear." (citation omitted)).

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ner whatsoever and for whatever purpose. . . . Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, ***nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons*** and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

*Id.* (emphasis added and citations omitted).<sup>2</sup> *Heller's* final statement as to Mr. Heller's request to register his handgun was: "*Assuming that Heller is not disqualified from the exercise of Second Amendment rights*, the District must permit him to register his handgun and must issue him a license to carry it in the home." *Id.* at —, 171 L.E. 2d at 683-84 (emphasis added). Although *Heller* does not directly state how Mr. Heller might become "disqualified from the exercise of his Second Amendment rights," it appears, when this provision is read in the context of the entire opinion, that he might be "disqualified" if he were a felon<sup>3</sup> or mentally ill. *Id.* at , 171 L. Ed. 2d at 678-83.

Finally, in *Britt* our Supreme Court declined to adopt a strict scrutiny standard of review in a case involving this very statute, N.C. Gen. Stat. § 14-415.1. *See Britt*, — N.C. at —, 681 S.E.2d at — n.2. The Supreme Court in *Britt* instead cited and quoted the rational basis test. *See id.*, — N.C. at —, 681 S.E.2d at —. Thus, for us to adopt strict scrutiny, we would have to overrule decisions of the North Carolina Supreme Court, including an opinion dating back to before this Court was even formed. *See, e.g., Dawson* at 547, 159 S.E.2d at 10; *Kerner* at 579, 107 S.E. 222, 226 (Allen, J., concurring). However, we do not have authority to overrule decisions of the Su-

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2. The Supreme Court's dicta regarding possession of firearms by felons has been criticized for its apparent wholesale approval of all such laws without analysis of any particular law. *See U.S. v. McCane*, — F.3d — (Okla. 2009 WL 2231658) (Tymkovich, J., concurring) ("The Court's summary treatment of felon dispossession in dictum forecloses the possibility of a more sophisticated interpretation of § 922(g)(1)'s scope. Applying *Heller's* individual right holding to various regulations would be complicated, and it is of course possible (if not probable) that different courts would articulate different standards. Already a number of commentators have considered and proposed approaches to the existing gun laws and the proper level of constitutional scrutiny. But the existence of on-point dicta regarding various regulations short-circuits at least some of the analysis and refinement that would otherwise take place in the lower courts." (citations omitted)).

3. The majority in *Heller* also did not specify whether it was referring to "felons" solely in the context of federal law or as generally used and separately defined by each state.

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preme Court, *see Cannon v. Miller*, 313 N.C. 324, 324, 327 S.E.2d 888, 888 (1985) (“I[t] appearing that the panel of Judges of the Court of Appeals to which this case was assigned has acted under a misapprehension of its authority to overrule decisions of the Supreme Court of North Carolina and its responsibility to follow those decisions, until otherwise ordered by the Supreme Court.”), and it is not the province of this Court to adopt a new standard for constitutional review, particularly in a situation where our Supreme Court has so recently declined to so hold. *See Britt*, — N.C. at —, 681 S.E.2d at — n.2. As the level of constitutional scrutiny is unchanged, we are still bound to apply the rational basis test, *see, e.g., Dawson* at 547, 159 S.E.2d at 10, under which this Court has previously concluded that N.C. Gen. Stat. § 14-415.1 is constitutional.<sup>4</sup> *See Britt*, 185 N.C. App. 610, 649 S.E.2d 402.

## 6. Analysis

We therefore consider defendant’s facial challenge to the constitutionality of N.C. Gen. Stat. § 14-415.1, which presents many of the same issues as presented to this Court in *Britt*. *See Britt*, 185 N.C. App., 610, 649 S.E.2d 402. Again, despite the fact that *Britt* has been reversed, it was only on an “as applied” basis, *see Britt*, — N.C. —, 681 S.E.2d 320, and thus we conclude that we are still bound by this Court’s rationale, analysis, and holding in *Britt* as to the facial constitutionality of N.C. Gen. Stat. § 14-415.1. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (“Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.” (citations omitted)).

In *Britt*, this Court stated:

A convicted felon is prohibited from possessing a firearm if the State shows a rational relation to a legitimate state interest, such as the safety and protection and preservation of the health and welfare of the citizens of this state. Legislative classifications

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4. We recognize that if use of the rational basis standard results in a lesser level of protection of the right to keep and bear arms under Article I, Section 30 than the protection as conferred by the Second Amendment, use of the rational basis standard may not be appropriate, as our Court has stated that “the North Carolina Constitution has been interpreted to guarantee a broader right to individuals to keep and bear arms.” *Fennell* at 143, 382 S.E.2d at 233. However, given the lack of authoritative direction from both *Heller* and *Britt* regarding the appropriate standard of review, we are still bound by precedent to use rational relation as the level of constitutional scrutiny in questions regarding an individual’s right to keep and bear arms. *See, e.g., Dawson* at 547, 159 S.E.2d at 10.

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will be upheld, provided the classification is founded upon reasonable distinctions, affects all persons similarly situated or engaged in the same business without discrimination, and has some reasonable relation to the public peace, welfare and safety. A court may not substitute its judgment of what is reasonable for that of the legislative body when the reasonableness of a particular classification is to be determined. Where the language of an Act is clear and unambiguous the courts must give the statute its plain and definite meaning.

In this case, plaintiff argues that a more appropriate legislation would allow convicted felons the ability to apply for restoration of the right to possess firearms. Plaintiff also argues that long guns, such as rifles and shotguns should be lawful for certain types of convicted felons to possess. We disagree. The General Assembly has made a determination that individuals who have been convicted of a felony offense shall not be able to possess a firearm. This statutory scheme which treats all felons the same, serves to protect and preserve the health, safety and welfare of the citizens of this State. Here, the legislature intended to prevent convicted felons from possessing firearms in its 2004 amendments. The 2004 amendment to N.C.G.S. § 14-415.1 is rationally related to a legitimate state interest.

*Britt*, 185 N.C. App. at 613-14, 649 S.E.2d at 405-06 (citations omitted).

Defendant here has not established “that no set of circumstances exists under which . . . [N.C. Gen. Stat. § 14-415.1] would be valid.”<sup>5</sup> *Thompson* at 491, 508 S.E.2d at 282 (“An individual challenging the facial constitutionality of a legislative act must establish that no set of circumstances exists under which the act would be valid.” (citation, quotation marks, and brackets omitted)). In fact, as discussed below, N.C. Gen. Stat. § 14-415.1 operates constitutionally as to defendant. This argument is overruled.

#### B. As Applied Challenge

Defendant also contends that N.C. Gen. Stat. § 14-415.1 is unconstitutional as applied to him because

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5. Although the Supreme Court held N.C. Gen. Stat. § 14-415.1 was unconstitutional as applied to Mr. Britt, *see Britt*, — N.C. —, 681 S.E.2d 320, “[t]he fact that [the] statute might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid.” *Thompson* at 491, 508 S.E.2d at 282 (citation and quotation marks omitted).

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[t]he indictment in this case alleged that the Defendant had been convicted in 1988 for possession of cocaine. R. pp 13-14. There is nothing inherently violent in [sic] possession of cocaine that would demonstrate that the Defendant's possession of a firearm would be a threat to public safety. The Defendant's record consists mostly of drug related offenses. No prior offenses had possession of a firearm as an essential element.

"[T]his Court must determine whether, as applied to plaintiff, N.C.G.S. § 14-415.1 is a reasonable regulation." *Britt*, — N.C. at —, 681 S.E.2d at —. Our Supreme Court stated the pertinent facts as to Mr. Britt as follows:

Plaintiff pleaded guilty to one felony count of possession with intent to sell and deliver a controlled substance in 1979. The State does not argue that any aspect of plaintiff's crime involved violence or the threat of violence. Plaintiff completed his sentence without incident in 1982. Plaintiff's right to possess firearms was restored in 1987. No evidence has been presented which would indicate that plaintiff is dangerous or has ever misused firearms, either before his crime or in the seventeen years between restoration of his rights and adoption of N.C.G.S. § 14-415.1's complete ban on any possession of a firearm by him. Plaintiff sought out advice from his local Sheriff following the amendment of N.C.G.S. § 14-415.1 and willingly gave up his weapons when informed that possession would presumably violate the statute. Plaintiff, through his uncontested lifelong non-violence towards other citizens, his thirty years of lawabiding conduct since his crime, his seventeen years of responsible, lawful firearm possession between 1987 and 2004, and his assiduous and proactive compliance with the 2004 amendment, has affirmatively demonstrated that he is not among the class of citizens who pose a threat to public peace and safety. Moreover, the nature of the 2004 amendment is relevant. The statute functioned as a total and permanent prohibition on possession of any type of firearm in any location. See N.C.G.S. § 14-415.1 (2004).

Based on the facts of plaintiff's crime, his long postconviction history of respect for the law, the absence of any evidence of violence by plaintiff, and the lack of any exception or possible relief from the statute's operation, as applied to plaintiff, the 2004 version of N.C.G.S. § 14-451.1 is an unreasonable regulation, not fairly related to the preservation of public peace and safety.

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In particular, it is unreasonable to assert that a nonviolent citizen who has responsibly, safely, and legally owned and used firearms for seventeen years is in reality so dangerous that any possession at all of a firearm would pose a significant threat to public safety.

*Britt*, — N.C. at —, 681 S.E.2d at —.

Thus, the *Supreme Court* in *Britt* focused on five factors in order to determine if N.C. Gen. Stat. § 14-415.1 is unconstitutional as applied to Mr. Britt: (1) the type of felony convictions, particularly whether they “involved violence or the threat of violence[,]” (2) the remoteness in time of the felony convictions; (3) the felon’s history of “lawabiding conduct since [the] crime,” (4) the felon’s history of “responsible, lawful firearm possession” during a time period when possession of firearms was not prohibited, and (5) the felon’s “assiduous and proactive compliance with the 2004 amendment.” *Id.*, — N.C. at —, 681 S.E.2d at —. In Mr. Britt’s case, our Supreme Court held that N.C. Gen. Stat. § 14-415.1, as applied to Mr. Britt, was “an unreasonable regulation, not fairly related to the preservation of public peace and safety.” *Id.*, — N.C. at —, 681 S.E.2d at —. We must therefore consider whether N.C. Gen. Stat. § 14-415.1 is a reasonable regulation which is “fairly related to the preservation of public peace and safety” as to defendant. *Id.*, — N.C. at —, 681 S.E.2d at —.

We first note that the factors identified in *Britt* required findings of fact regarding the plaintiff. *See id.*, — N.C. at —, 681 S.E.2d at —. Normally, the trial court finds facts, and the appellate courts do not engage in fact finding. *See Godfrey v. Zoning Bd. of Adjustment*, 317 N.C. 51, 63, 344 S.E.2d 272, 279 (1986) (“Fact finding is not a function of our appellate courts.”) However, the trial court order in *Britt* did not find most of the facts regarding Mr. Britt as noted by the Supreme Court, and thus the Supreme Court apparently based its factual findings as to Mr. Britt upon the uncontroverted evidence presented before the trial court. Just as in *Britt*, the trial court here did not make findings of fact regarding defendant, but there was uncontroverted evidence presented as to defendant’s prior convictions, his history of a lack of “lawabiding conduct since [the] crime,” *Britt*, — N.C. at —, 681 S.E.2d at —, and of firearm possession, and his compliance with the 2004 amendment. As these facts are not in dispute, we will analyze defendant’s as applied challenge to N.C. Gen. Stat. § 14-415.1 in the same manner as did our Supreme Court in *Britt*. *See Britt*, — N.C. at —, 681 S.E.2d at —.

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As to defendant's previous felony convictions, defendant was convicted in 1988 for selling and delivering cocaine, in 1989 for indecent liberties with a minor, and in 2005 for possessing cocaine.<sup>6</sup> As with Mr. Britt, there is no indication that these crimes "involved violence or the threat of violence[,] " but whereas Mr. Britt had only one drug possession conviction, defendant herein has had three felony convictions, including indecent liberties with a minor. *Id.*, — N.C. at —, 681 S.E.2d at —. Furthermore, Mr. Britt's felony convictions were more remote in time, as he was convicted in 1979; *id.*, — N.C. at —, 681 S.E.2d at —, defendant's most recent felony conviction was in 2005. In addition to his felony convictions, defendant has demonstrated a blatant disregard for the law as he has been convicted of numerous misdemeanors: possession of drug paraphernalia in 1984; possession of cocaine in 1988; driving while impaired in 1987; driving while impaired in 1992; maintaining a place to keep controlled substances in 2000; misdemeanor possession of a controlled substance in 2008; and possession of drug paraphernalia in 2008. Just as in *Britt*, "[n]o evidence has been presented which would indicate that [defendant] is dangerous or has ever misused firearms" since his felony convictions; *id.*, — N.C. at —, 681 S.E.2d at —; however, defendant acquired the guns at issue *after* N.C. Gen. Stat. § 14-415.1 specifically prohibited him from possessing them. Furthermore, in 2005 Detective Sergeant Dennis warned defendant about the 2004 change in the law and gave "him the benefit of the doubt that maybe he didn't know about it" so that defendant had an opportunity to remove the guns from his residence. In 2006, Officer Burns again discussed with defendant the fact that he was prohibited from possessing guns in his home. Defendant failed to heed both of these specific warnings. Instead of demonstrating "assiduous and proactive compliance with the 2004 amendment," defendant flagrantly violated it. *Id.*, — N.C. at —, 681 S.E.2d at —. Thus, in considering the factors as noted by *Britt*, *see id.*, — N.C. at —, 681 S.E.2d at —, we cannot conclude that N.C. Gen. Stat. § 14-415.1 is unconstitutional as applied to defendant.

As to defendant, N.C. Gen. Stat. § 14-415.1 is a reasonable regulation which is "fairly related to the preservation of public peace and safety." *Id.*, — N.C. at —, 681 S.E.2d at —. It is not unreasonable to prohibit a convicted felon who has violated the law on numerous

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6. Defendant's indictments for possession of a firearm by a felon were based upon his 1988 felony conviction, but as we must consider the defendant's history of "lawabiding conduct," *Britt*, — N.C. at —, 681 S.E.2d at —, we note his more recent felonies also for purposes of this constitutional analysis.

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occasions, even as recently as last year, and who ignored two valid warnings of his unlawful conduct, from possessing firearms in order to preserve “public peace and safety.” *Id.*, — N.C. at —, 681 S.E.2d at —. We therefore hold that N.C. Gen. Stat. § 14-415.1 is constitutional as applied to defendant. This argument is overruled.

IV. *Ex Post Facto* and Bill of Attainder

[2] Defendant also contends that N.C. Gen. Stat. § 14-415.1 violates the prohibition against *ex post facto* laws and is an unconstitutional bill of attainder; however, these issues have previously been decided by this Court. *See State v. Johnson*, 169 N.C. App. 301, 303-10, 610 S.E.2d 739, 741-46 (concluding that N.C. Gen. Stat. § 14-415.1 does not violate prohibitions against *ex post facto* laws nor is it an unconstitutional bill of attainder), *review denied and appeal dismissed*, 359 N.C. 855, 619 S.E.2d 855 (2005); *see also State v. Watkins*, — N.C. App. —, —, 672 S.E.2d 43, 52 (2009) (concluding that “defendant’s increased sentence due to the change in the classification of his prior conviction serves only to enhance his punishment for the present offenses . . . and not to punish defendant for his prior conviction, the constitutional prohibition on *ex post facto* laws is not implicated”). Neither *Heller* nor *Britt* require any change in this Court’s analysis of these issues. Accordingly, these arguments are overruled.

## V. Double Jeopardy

[3] Defendant also argues that

the trial court erred in denying the defendant’s motion to dismiss and consolidate indictments for possession of a firearm by a felon when the evidence supported only a single act of possession of multiple firearms. Convictions for multiple charges violated legislative intent and the defendant’s constitutional right to be free from double jeopardy.

(Original in all caps.)

In *State v. Garris*, the defendant was convicted of, *inter alia*, “two counts of possession of a firearm by a felon[.]” — N.C. App. —, —, 663 S.E.2d 340, 344, *disc. review denied*, 362 N.C. 684, 670 S.E.2d 907 (2008). The defendant argued that “the trial court erred by entering two felony convictions for possession of a firearm by a felon instead of one felony conviction.” *Id.* at —, 663 S.E.2d at 346. This Court concluded that

a review of the applicable firearms statute shows no indication that the North Carolina Legislature intended for N.C. Gen. Stat.

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§ 14-415.1(a) to impose multiple penalties for a defendant's simultaneous possession of multiple firearms. Here, defendant was not only convicted twice for possession of a firearm by a felon but was also sentenced twice, evidenced by File Numbers 06CRS053058 and 06CRS053059. The two firearms, both entered into evidence, originated out of the same act of possession. The firearms were possessed simultaneously because as defendant ran from the vehicle they were both on his person, either in his clothing or inside the black plastic bag he removed from the vehicle. Upon review, we hold that defendant should be convicted and sentenced only once for possession of a firearm by a felon based on his simultaneous possession of both firearms. Therefore, we find error with the trial court's decision to enter two convictions against defendant for possession of a firearm by a felon and to sentence defendant twice based on these convictions. We uphold the trial court's first conviction for possession of a firearm by a felon (06CRS053058) but reverse the second conviction (06CRS053059).

*Id.* at —, 663 S.E.2d at 348.

The State argues that the case at bar and *Garris*

are dramatically different in that the trial court in *Garris* failed to arrest judgment on either of the two convictions. Thus, the defendant in *Garris* was not only convicted twice, but was also sentenced twice and subject to multiple penalties for his simultaneous possession of multiple firearms. *Garris* stands for the proposition that multiple penalties may not be imposed under N.C.G.S. § 14-415.1 for a defendant's simultaneous possession of multiple firearms.

However, we first note that in *Garris* this Court concluded that the trial court erred in “enter[ing] two convictions[,]” not merely in entering two sentences. *Id.* Also, instead of simply requiring the trial court to arrest judgment on one of the convictions, this Court reversed the second conviction entirely. *See id.* Thus, this Court's language and mandate in *Garris* indicates that multiple convictions for simultaneous possession of firearms by a felon is reversible error. *See id.* Furthermore, “[t]he legal effect of arresting judgment is to vacate the verdict and sentence. [However,] [t]he State may proceed against the defendants if it so desires, upon new and sufficient bills of indictment.” *State v. Goforth*, 65 N.C. App. 302, 306, 309 S.E.2d 488, 492 (1983) (citations omitted). As the State could issue new indictments

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against defendant upon the arrested judgments, defendant could be placed in double jeopardy. *See, e.g., id.* Therefore, pursuant to *Garris*, we reverse the ten convictions upon which judgment was arrested. *Garris* at —, 663 S.E.2d at 348.

## VI. Conclusion

In conclusion, we reverse defendant's ten convictions for possession of a firearm by a felon where judgment was arrested. As to defendant's remaining conviction upon which he was sentenced, we find no error.

REVERSED IN PART and NO ERROR IN PART.

Judge ERVIN concurs.

Judge ELMORE concurs in part and dissents in part in a separate opinion.

ELMORE, Judge, concurring in part and dissenting in part.

For the reasons stated below, I respectfully dissent from part IV of the majority opinion. I concur by separate opinion in part III and concur fully in part V.

As the majority notes, I dissented from the majority opinion in *Britt I*.<sup>7</sup> Because the Supreme Court so clearly declined to base its decision reversing this Court's holding in *Britt I* on my dissent or any of the legal issues raised therein, I renew those same arguments here.

**Right to Bear Arms**

I agree with the majority's analysis of *Heller* and its inapplicability to the case at bar. However, I disagree with what standard of review should be applied. The majority argues that we should apply rational basis review to defendant's constitutional challenge to N.C. Gen. Stat. § 14-415.1. As applied in *Rhyne v. K-Mart Corp.*, and as recited by the majority, to survive rational basis review, a challenged statute must "bear some rational relationship to a conceivable legitimate governmental interest." *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 180, 594 S.E.2d 1, 15 (2004) (quotations, citation, and alteration omitted). The Supreme Court in *Britt II* clearly stated that "any regulation of the right to bear arms . . . must be at least reasonable and not pro-

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7. For ease of reference, I refer to the Court of Appeals 2007 *Britt* opinion as "*Britt I*" and the Supreme Court's 2009 *Britt* opinion as "*Britt II*."

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hibitive, and must bear a fair relation to the preservation of the public peace and safety.” *Britt v. North Carolina*, — N.C. —, —, 681 S.E.2d 320, 322 (2009) (quotations and citation omitted). In my dissent from *Britt I*, I asserted that this was the proper standard of review, not rational basis as applied by the *Britt I* majority. *Britt v. North Carolina*, 185 N.C. App. 610, 621, 649 S.E.2d 402, 410 (2007) (Elmore, J., dissenting) (“Despite the majority’s attempted reliance on *Johnson* for support of a rational relationship test, however, I believe that the proper standard, as articulated in *Johnson*, requires that the regulation must be reasonable and be related to the achievement of preserving public peace and safety. Rather than simply requiring that the statute be rationally related to a legitimate government purpose, I therefore would require that the regulation also be reasonable.”) (quotations and citations omitted). The standard articulated by the Supreme Court in *Britt II* is more stringent than rational basis, although certainly less stringent than intermediate or strict scrutiny. Because the majority here continues to follow the majority opinion in *Britt I*, which I believe to have been wrongly decided, I renew my previous dissent from *Britt I*.

However, I agree with the conclusion reached by the majority in its analysis of defendant’s as applied challenge. The majority interprets *Britt II* as having established a factors test for determining whether § 14-415.1 is a reasonable regulation. The factors articulated by the majority follow logically from the Supreme Court’s analysis in *Britt II*; the pivotal question that application of those factors seeks to answer is whether the statute, as applied to defendant, is “an unreasonable regulation, not fairly related to the preservation of public peace and safety.” *Britt II*, — N.C. at —, 681 S.E.2d at 323.<sup>8</sup> For the reasons stated in the majority, I would also hold that § 14-415.1 is not unconstitutional as applied to defendant.

**Ex Post Facto and Bill of Attainder**

As when I dissented in *Britt I*, I believe that § 14-415.1 violates the prohibition against *ex post facto* laws. The 2004 amendments to the statute renders this Court’s analysis in *Johnson* easily distin-

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8. With respect to the majority’s concern that *Britt II* has enabled or even required appellate courts to engage in fact finding, I do not believe this to be an issue in this case or other criminal cases. Mr. Britt filed a civil suit against the State, and the parties then moved for summary judgment. The trial court granted the State’s motion for summary judgment, resulting in an order. Here, we are dealing with a criminal defendant. The relevant facts are uncontroverted and were tried before a jury. We merely recite facts as represented during the trial phase, just as we would in any other criminal case.

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guishable from both the case at bar and *Britt*. To that end, I repeat the arguments I put forth in my earlier dissent:

In *Johnson* . . . we held that the 1995 statute was constitutional. At that time, it was clear to this Court that the intent of [the] legislature was to regulate the possession of dangerous weapons. Likewise, we held “that the law [was] not so punitive in effect that it should be considered punitive rather than regulatory.” [*Johnson*, 169 N.C. App. at 308, 610 S.E.2d at 744.] In so holding, this Court relied on the following facts: “[The law] continue[d] to exempt the possession of firearms within one’s home or lawful place of business. The prohibition remain[ed] limited to weapons that, because of their concealability, pose a unique risk to public safety.” *Id.* (quoting [*United States v. Farrow*, 364 F.3d 551, 555 (4th Cir. 2004)]) (citations, quotations, and alterations omitted).

Applying the same analysis to the statute as amended, I would reach a different result. The amended statute does not exempt the possession of firearms within one’s home or business. Furthermore, rather than limiting the proscription “to weapons that, because of their concealability, pose a unique risk to public safety,” the legislature broadened the ban to essentially all weapons. *Id.* (citations and quotations omitted). The result is that the statute is no longer “narrowly tailored to regulate only the sorts of firearm possession by felons that, because of the concealability, power, or location of the firearm, are most likely to endanger the general public,” as it was when the *Farrow* court reached its decision. *Farrow*, 364 F.3d at 555 (citation and quotations omitted). The exceptional broadness of the statute serves to undermine the legislature’s stated intent of regulation and serves instead as an unconstitutional punishment.

I would also hold that the application of the statute to [defendant] violated [defendant’s]] due process rights. I recognize that “the right of individuals to bear arms is not absolute, but is subject to regulation.” *Johnson*, 169 N.C. App. at 311, 610 S.E.2d at 746 (quoting *State v. Dawson*, 272 N.C. 535, 546, 159 S.E.2d 1, 9 (1968)). . . . The major differences between the 1995 and current versions of the statute lead me to conclude that the statute in its current form is no longer a reasonable regulation. Instead, I would hold that the current statute operates as an outright ban, completely divesting [defendant] of his right to bear arms without

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due process of law. *Cf. id.* (holding that the *Johnson* defendant was not “completely divested of his right to bear arms as [the then current] N.C. Gen. Stat. § 14-415.1 allow[ed] him to possess a firearm at his home or place of business.”).

In enacting the 2004 amendment, the legislature simply overreached. Thereafter, the statute operated as a punishment, rather than a regulation.

*Britt I*, 185 N.C. App. at 620-21, 649 S.E.2d at 409-10 (Elmore, J., dissenting) (footnotes omitted).

Because I believe that § 14-415.1 operates as a punishment, rather than as a regulation, I would also find the statute to be an unconstitutional bill of attainder.

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IN THE MATTER OF: JERRY WEBBER, RESPONDENT

No. COA08-1488

(Filed 8 December 2009)

**1. Mental Illness— recommitment orders—impermissible collateral attack on prior order**

Respondent was not able to undo subsequent recommitments by challenging the prior final order that he did not appeal. Respondent’s appeal from the present commitment order was an impermissible collateral attack on the prior order. Respondent was required to appeal the prior order under N.C.G.S. § 122C-272 or request a supplemental hearing under N.C.G.S. § 122C-274(e). The trial judge thus had the authority to order his recommitment.

**2. Mental Illness— outpatient commitment—clear, cogent, and convincing evidence**

The trial court did not err by its findings of fact under N.C.G.S. § 122C-263(d)(1)(c) regarding whether, without treatment, respondent’s psychiatric condition would deteriorate and predictably result in dangerousness because the trial court’s handwritten findings of fact combined with Dr. Godfrey’s incorporated report provided sufficient detail to meet the statutory requirements and to permit appellate review.

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**3. Mental Illness— finding that condition would deteriorate and could likely become dangerous—psychiatric history**

The trial court did not err by finding that respondent's condition would deteriorate and that he could likely become dangerous because Dr. Godfrey's testimony, in conjunction with respondent's own testimony, provided sufficient support for the trial court's determination under N.C.G.S. § 122C-263(d)(1)(c). Under N.C.G.S. § 122C-263(d)(1)(c), the State was only required to prove that respondent was in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness as defined by N.C.G.S. § 122C-3(11).

Appeal by respondent from order entered 14 May 2008 by Judge Meredith A. Shuford in Cleveland County District Court. Heard in the Court of Appeals 20 May 2009.

*Attorney General Roy Cooper, by Assistant Attorney General M. Elizabeth Guzman, for the State.*

*Appellate Defender Staples Hughes, by Assistant Appellate Defender David W. Andrews, for respondent-appellant.*

GEER, Judge.

Respondent Jerry Webber appeals from the trial court's order recommitting him to a third 180-day period of involuntary outpatient treatment. Mr. Webber primarily contends that because his initial commitment order in 2007 provided for a term of outpatient commitment that exceeded the period authorized by the governing statute, the initial commitment period expired as a matter of law, and, as a consequence, the trial court lacked jurisdiction to enter subsequent commitment orders. Because Mr. Webber failed to appeal from the initial order or request a supplemental hearing as permitted by statute, Mr. Webber's appeal from the present commitment order amounts to an impermissible collateral attack on the prior order. We hold, therefore, that the trial court had subject matter jurisdiction when entering the order on appeal. As we find Mr. Webber's remaining arguments unpersuasive, we affirm.

Facts

On 11 May 2007, just prior to Mr. Webber's discharge from Broughton Hospital, a petition and affidavit was filed requesting that Mr. Webber be involuntarily committed. The petition alleged:

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Respondent is a ddanger [sic] to himself and others. He is threatening others. He has given a date [after his release] that he is going to kill severqal [sic] people and himself. He is diagnosed as paranoid/schizophrenia. He has not taken meds for over a year. He is being released from Broughton on Friday afternoon [sic]. Upon conversations yesterday, he presented delusional and psychotic and could not carry on a conversation. His family is afraid of him[.]

Based on the allegations in the petition, a magistrate ordered law enforcement to take Mr. Webber into custody and transport him for an examination by a psychiatrist or eligible psychologist.

Two evaluations were performed at King's Mountain Hospital, both determining that Mr. Webber was mentally ill and dangerous to himself, and one also concluding that Mr. Webber was dangerous to others. Dr. Ramesh Gihwala, one of the doctors who examined Mr. Webber, stated in a report dated 18 May 2007 that, in her clinical opinion, he had been "inadequately medicated" and was not complying with his medications. Dr. Gihwala explained that, initially, Mr. Webber was "extremely angry," and he felt that he was being "threatened and persecuted" by individuals in the community. Mr. Webber, however, cooperated with Dr. Gihwala's medical treatment, agreed to have his medications adjusted, and was given long-acting medication in an attempt to maintain his stability over an extended period. Dr. Gihwala recommended outpatient treatment and requested a six-month outpatient commitment. She noted:

At this point Mr. Webber is agreeable to an outpatient commitment to insure outpatient follow up and compliance with his treatment and was urged to speak with his lawyer, which he has done, and he's agreeable to follow through with outpatient commitment which I hereby respectfully request for a period of at least 6 months outpatient arrangement have been made for him to be seen at Footprints Incorporated as well as Pathways in Shelby. Mr. Webber is anxious to be discharged and I am comfortable with his discharge, provided his treatment continues hence the request for the outpatient treatment commitment. I trust that you will grant this order expeditiously.

An involuntary commitment hearing was conducted in district court on 21 May 2007. The resulting order, entered the same day, is a form order published by the Administrative Office of the Courts (Form AOC-SPC-203, Rev. 1/97). The trial court incorporated by ref-

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erence Dr. Gihwala's report and based its order on that report. In the findings section of the order, the court wrote in by hand: "This court expresses concern about the ability of this Defendant [sic] to function in [the] community given the significant history of this Respondent to make threatening, suicidal, homicidal statements." The court further found that the outpatient program needed to be in place before Mr. Webber was released from inpatient treatment. The trial court nonetheless concluded that although Mr. Webber was mentally ill and dangerous to others, he satisfied the criteria for outpatient commitment.

The printed form gave the trial court the option of writing on the form a particular number of days of commitment or checking a box for 90 days or 180 days. The court ordered that Mr. Webber be committed for 72 hours at Kings Mountain Hospital and checked the box indicating that the inpatient commitment period would be followed by 180 days of outpatient commitment.

At the request of Dr. Joseph L. Godfrey, Mr. Webber's treating physician for Mr. Webber's outpatient treatment, a second commitment hearing was held on 13 November 2007. On 15 November 2007, District Court Judge Meredith A. Shuford, who had not presided over the first hearing, entered an order (also on the same printed form that had been used for the first outpatient commitment order), finding:

Based on the testimony of [Dr.] Joseph Godfrey, the treating psychiatrist for the respondent, and the testimony of the respondent, the court finds the respondent is mentally ill and lacks insight that he has psychiatric problems that require treatment, and that the respondent lacks the judgment of when it is appropriate for him to obtain treatment and to continue taking medication that controls his inappropriate behaviors involving threats, suicidal and homicidal ideations. [Dr.] Godfrey believes respondent's need to be medicated for his psychiatric condition will be a life-long necessity. Respondent testified he does not feel like he needs any medication and that he has no mental disability . . . .

Judge Shuford concluded that Mr. Webber was mentally ill but qualified for outpatient commitment. Judge Shuford, therefore, ordered Mr. Webber to be recommitted on an outpatient basis for an additional period of 180 days.

On 12 May 2008, Dr. Godfrey filed another request for hearing and attached his examination and recommendation report. In his report, Dr. Godfrey stated:

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I have been treating the patient noted above [who] has been under my care for several months. I have also read his history. He has a long documented history of dependable and predictable non-compliance with treatment recommendations due to lack of insight, resulting in hostile acting out requiring hospitalization due to a reasonable fear of harm to others in the community.

Dr. Godfrey indicated on the hearing request form that the hearing was necessary to determine the appropriateness of Mr. Webber's outpatient treatment.

The commitment hearing was held on 12 and 14 May 2008. Both Mr. Webber and Dr. Godfrey testified. On 14 May 2008, Judge Shuford entered a form order, checking the box incorporating by reference Dr. Godfrey's report "as findings." Written in by hand, Judge Shuford found:

Based on doctor's report and his testimony, court finds respondent is suffering from a mental illness and that the treatment and medication are benefiting [sic] the respondent. That the respondent does not recognize the benefits of the treatment and that it is unlikely he would continue treatment without a court order requiring him to do so, and that if he did not continue treatment his condition would deteriorate and he could likely become a danger to himself or others. This opinion is based on his prior medical history, and prior actions, as well as his current demeanor which indicates he does not recognize his illness and the necessity of treatment.

Judge Shuford concluded that Mr. Webber is mentally ill and is

capable of surviving safely in the community with available supervision from family, friends or others; and based on respondent's psychiatric history, the respondent is in need of treatment in order to prevent further disability and deterioration which would predictably result in dangerousness to self or others. And, that the respondent's inability to make an informed decision to voluntarily seek and comply with recommended treatment is caused by: . . . the nature of the respondent's mental illness.

Judge Shuford ordered Mr. Webber to be involuntarily committed for a third 180-day period of outpatient treatment. Mr. Webber timely appealed to this Court from the trial court's 14 May 2008 order.

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Discussion

As an initial matter, we note that although Mr. Webber's term of involuntary commitment has expired by the terms of the 14 May 2008 order, "a prior discharge will not render questions challenging the involuntary commitment proceeding moot." *In re Booker*, 193 N.C. App. 433, 436, 667 S.E.2d 302, 304 (2008) (quoting *In re Mackie*, 36 N.C. App. 638, 639, 244 S.E.2d 450, 451 (1978)). When the challenged order may form the basis for future commitment or may cause other collateral legal consequences for the respondent, an appeal of that order is not moot. *See In re Hatley*, 291 N.C. 693, 695, 231 S.E.2d 633, 635 (1977) ("The possibility that respondent's commitment in this case might likewise form the basis for a future commitment, along with other obvious collateral legal consequences, convinces us that this appeal is not moot."). We, therefore, address the merits of this appeal.

## I

[1] Mr. Webber first challenges the trial court's subject matter jurisdiction to enter the 14 May 2008 commitment order. To initiate involuntary outpatient commitment, a petition and affidavit is filed with the clerk of superior court or magistrate alleging that the respondent is mentally ill and either (1) dangerous to self or others or (2) in need of treatment to prevent further disability or deterioration that would predictably result in dangerousness. N.C. Gen. Stat. § 122C-261(a) (2007). If the clerk or magistrate finds reasonable grounds to believe that the facts in the petition and affidavit are true, the respondent is taken into custody to be examined by a physician or eligible psychologist. N.C. Gen. Stat. § 122C-261(b).

If the examining doctor recommends outpatient commitment and the clerk or magistrate finds probable cause to believe that the respondent satisfies the criteria for outpatient commitment, a hearing is conducted in district court to determine the appropriateness of involuntary commitment. N.C. Gen. Stat. § 122C-261(d). At the initial hearing, the trial court may order outpatient commitment or a combination of inpatient and outpatient commitment for a period "not in excess of 90 days." N.C. Gen. Stat. § 122C-271(b)(1)-(2) (2007).

Subsequent commitment proceedings may be initiated if the treating physician determines that the respondent continues to meet the criteria for outpatient commitment. The physician is required to notify the superior court clerk 15 days "before the end of the initial . . . period[] of outpatient commitment . . ." N.C. Gen. Stat.

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§ 122C-275(a) (2007). The superior court clerk then calendars the recommitment hearing 10 days prior to the end of the previous commitment term. *Id.* If the respondent continues to meet the criteria for outpatient commitment, the trial court may order outpatient commitment for an “additional period not in excess of 180 days.” N.C. Gen. Stat. § 122C-275(c).

It is undisputed on appeal that the trial court’s 21 May 2007 commitment order fails to comply with N.C. Gen. Stat. § 122C-271(b). By statute, the court was only authorized to order commitment (inpatient and outpatient) for 90 days, but, instead, the trial court ordered that Mr. Webber be committed for 72 hours of inpatient treatment and 180 days of outpatient treatment. Mr. Webber contends that his commitment expired as a matter of law, by virtue of N.C. Gen. Stat. § 122C-271(b), after 90 days notwithstanding the period of commitment actually ordered. He further argues that under N.C. Gen. Stat. § 122C-275 any request for recommitment was accordingly required to be submitted 15 days prior to the expiration of the end of the 90-day period and not from the 180-day period erroneously ordered by the trial court. Mr. Webber maintains that because Dr. Godfrey did not request recommitment until 15 days before the end of the 180-day commitment period, Judge Shuford lacked subject matter jurisdiction to recommit him in November 2007 and again in May 2008.

We note that Mr. Webber does not dispute that the trial court initially had subject matter jurisdiction to enter the 21 May 2007 order. Nor does he dispute that each request for hearing was submitted no later than 15 days prior to the expiration of each commitment period ordered by the court. Mr. Webber also does not identify any procedural deficiency in the first rehearing (resulting in the 15 November 2007 order) or the second rehearing (resulting in the 14 May 2008 order) apart from the improper term of commitment set out in the initial 21 May 2007 order.

Mr. Webber’s argument hinges entirely on the error in the initial order. N.C. Gen. Stat. § 122C-272 (2007) provides with respect to the initial order that the “[j]udgement of the district court is final.” Under N.C. Gen. Stat. § 122C-272, the State or “any party on the record” may appeal to the Court of Appeals, although “[t]he district court retains limited jurisdiction for the purpose of hearing all reviews, rehearings, or supplemental hearings allowed or required under this Part.” Since, by statute, the initial order was “final,” and Mr. Webber failed to appeal from that order, his argument in this case—attacking the legality of that order—constitutes a collateral attack.

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A collateral attack is one in which a party is not entitled to the relief requested “ ‘unless the judgment in another action is adjudicated invalid.’ ” *Clayton v. N.C. State Bar*, 168 N.C. App. 717, 719, 608 S.E.2d 821, 822 (quoting *Thrasher v. Thrasher*, 4 N.C. App. 534, 540, 167 S.E.2d 549, 553 (1969)), *cert. denied*, 359 N.C. 629, 615 S.E.2d 867 (2005). “A collateral attack on a judicial proceeding is ‘an attempt to avoid, defeat, or evade it, or deny its force and effect, in some incidental proceeding not provided by law for the express purpose of attacking it.’ ” *Reg’l Acceptance Corp. v. Old Republic Sur. Co.*, 156 N.C. App. 680, 682, 577 S.E.2d 391, 392 (2003) (quoting *Hearon v. Hearon*, 44 N.C. App. 361, 362, 261 S.E.2d 9, 10 (1979)). Collateral attacks generally are not permitted under North Carolina law. *Pinewood Homes, Inc. v. Harris*, 184 N.C. App. 597, 601, 646 S.E.2d 826, 830 (2007).

Here, Mr. Webber attempts to invalidate the 14 May 2008 commitment order by asserting that the trial court exceeded its jurisdiction in its initial 21 May 2007 order. Mr. Webber is, therefore, in this appeal, making a collateral attack on the 21 May 2007 order.

While we have found no authority addressing collateral attacks in civil commitment proceedings, in the criminal context, our appellate courts have held that a defendant, who was placed on probation, cannot in a probation revocation hearing attack the sentence imposed in the original proceeding when the defendant did not appeal that sentence. *See State v. Holmes*, 361 N.C. 410, 413, 646 S.E.2d 353, 355 (2007) (“Defendant did not appeal the 2004 judgments, and consequently they became final. Defendant now attempts to attack the sentences imposed and suspended in 2004 in his appeal from the 2005 judgments revoking his probation and activating his sentences. We conclude, consistent with three decades of Court of Appeals precedent, that this challenge is an impermissible collateral attack on the original judgments.”); *State v. Rush*, 158 N.C. App. 738, 741, 582 S.E.2d 37, 39 (2003) (holding that by failing to appeal from the original judgment suspending her sentences, defendant waived any challenge to that judgment and thus could not attack it on appeal of subsequent order activating her sentence); *State v. Noles*, 12 N.C. App. 676, 678, 184 S.E.2d 409, 410 (1971) (“Questioning the validity of the original judgment where sentence was suspended on appeal from an order activating the sentence is, we believe, an impermissible collateral attack.”).

Mr. Webber, however, argues that this case is analogous to *State v. Surratt*, 177 N.C. App. 551, 553, 629 S.E.2d 341, 342 (2006), in

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which this Court held that the defendant's probation term had expired, and thus the trial court lacked jurisdiction to revoke his probation and activate his sentence. In *Surratt*, the defendant was not, however, challenging a prior appealable judgment or order, as Mr. Webber does here and as did the defendants in *Holmes*, *Rush*, and *Noles*. Instead, in *Surratt*, 177 N.C. App. at 552, 629 S.E.2d at 342, the defendant's sentence was suspended, and he was placed on supervised probation. After the probation had expired, according to the terms of the judgment imposing probation, the trial court entered orders purporting to extend the probation that had already lapsed. This Court held that the State could not revoke the defendant's already expired probation. *Id.* at 553, 629 S.E.2d at 342. Thus, the *Surratt* defendant was actually seeking to enforce the terms of the original judgment rather than attacking them.

Mr. Webber argues further, however, that there is no improper collateral attack because the 21 May 2007 order was void for lack of subject matter jurisdiction. A judgment or order that is void, as opposed to voidable, is subject to collateral attack. *See Clark v. Carolina Homes, Inc.*, 189 N.C. 703, 708, 128 S.E. 20, 24 (1925) (holding that void judgments "yield to collateral attack, but [voidable judgments] never yield to a collateral attack[;] [i]t requires a direct attack to set aside or correct a voidable judgment"). A lack of subject matter jurisdiction renders the judgment or order void. *See Jenkins v. Piedmont Aviation Servs.*, 147 N.C. App. 419, 425, 557 S.E.2d 104, 108 (2001) (" 'A lack of jurisdiction or power in the court entering a judgment always avoids the judgment, and a void judgment may be attacked whenever and wherever it is asserted, without any special plea.' " (quoting *Allred v. Tucci*, 85 N.C. App. 138, 143, 354 S.E.2d 291, 295, *disc. review denied*, 320 N.C. 166, 358 S.E.2d 47 (1987))), *disc. review denied*, 356 N.C. 303, 570 S.E.2d 724 (2002).

Here, Mr. Webber does not dispute that the district court had subject matter jurisdiction over the initial outpatient commitment proceeding. He also does not cite any authority suggesting that a trial court with subject matter jurisdiction could, under these circumstances, be subsequently stripped of jurisdiction. Rather, while Mr. Webber uses the phrase "subject matter jurisdiction," he is actually arguing that the trial court did not have authority to order an 180-day commitment under N.C. Gen. Stat. § 122C-271(b). In *Hamilton v. Freeman*, 147 N.C. App. 195, 204, 554 S.E.2d 856, 861 (2001), *appeal dismissed and disc. review denied*, 355 N.C. 285, 560 S.E.2d 803 (2002), this Court held that despite the fact that the trial court

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lacked the authority to impose the sentences that it did, “[s]uch a judgment is voidable, but not void *ab initio*, and is binding until vacated or corrected.”

As in *Hamilton*, there is no dispute here that the trial court had authority to adjudicate the issues in dispute and had jurisdiction over the parties. As a result, the trial court’s 21 May 2007 order “is not void, even if contrary to law.” *Id.* See also *State v. Wilson*, 154 N.C. App. 127, 131, 571 S.E.2d 631, 633 (2002) (“If contrary to law, the judgment is only voidable, and therefore constitutes a binding judgment of conviction that must be honored until vacated or corrected.”), *aff’d per curiam*, 357 N.C. 498, 586 S.E.2d 89 (2003).

Mr. Webber argues further that the trial court’s jurisdiction “lapsed” as a matter of law, analogizing this case to *In re K.W.*, 191 N.C. App. 812, 814, 664 S.E.2d 66, 67 (2008). In *K.W.*, this Court held that the trial court lacked jurisdiction to enter an order finding the juvenile delinquent when the delinquency petitions were not filed within the time frame mandated by the governing statute. In *K.W.*, however, the result of the untimely filing was that the trial court never properly obtained subject matter jurisdiction as an initial matter over the delinquency proceedings. In contrast, it is undisputed that the trial court obtained jurisdiction over the civil commitment proceedings in this case when the petition and affidavit were filed pursuant to N.C. Gen. Stat. § 122C-261.

In making his jurisdictional argument, Mr. Webber fails to meaningfully distinguish this Court’s holding in *In re Boyles*, 38 N.C. App. 389, 247 S.E.2d 785 (1978), *appeal dismissed and disc. review denied*, 296 N.C. 411, 251 S.E.2d 468 (1979). In *Boyles*, the prior statute governing recommitment proceedings—N.C. Gen. Stat. § 122-58.11(e)—provided that requests for rehearings were required to be submitted 15 days prior to the end of the commitment period. *Id.* at 389-90, 247 S.E.2d at 786. The respondent’s doctor requested a recommitment hearing six days prior to the end of the respondent’s commitment period. *Id.* at 389, 247 S.E.2d at 786. At the recommitment hearing, the respondent moved to dismiss the proceedings for lack of a timely request for a hearing. *Id.* The trial court denied the motion, and on appeal, the respondent argued that the trial court lacked authority to adjudicate the case because there was no timely request for a hearing. *Id.* at 390, 247 S.E.2d at 786. This Court rejected that argument, holding that “[d]ismissal is too drastic, and unless respondent can show some prejudice the proper action would be to continue the proceeding until ample notice has been given.” *Id.*

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Similarly, in this case, Mr. Webber argues that due to the error in the initial commitment order, all of the subsequent requests for rehearings were untimely. Under *Boyles*, however, that contention does not entitle him to dismissal of the proceedings.

In addition, Mr. Webber's reading of N.C. Gen. Stat. § 122C-271 is inconsistent with N.C. Gen. Stat. § 122C-272. *See Bd. of Adjustment of the Town of Swansboro v. Town of Swansboro*, 334 N.C. 421, 427, 432 S.E.2d 310, 313 (1993) ("Statutes dealing with the same subject matter must be construed *in pari materia* and harmonized, if possible, to give effect to each."). N.C. Gen. Stat. § 122C-272 provides that the district court's order is "final" and may be appealed. It also provides, however, that jurisdiction continues in the district court for purposes of rehearings. Interpreting N.C. Gen. Stat. § 122C-271(b) as Mr. Webber suggests would produce the illogical result that if the district court exceeded its authority in an initial commitment order, it would then be divested of jurisdiction to hold any rehearings notwithstanding § 122C-272. *See State ex rel. Comm'r of Ins. v. N.C. Auto. Rate Admin. Office*, 294 N.C. 60, 68, 241 S.E.2d 324, 329 (1978) ("In construing statutes courts normally adopt an interpretation which will avoid absurd or bizarre consequences, the presumption being that the legislature acted in accordance with reason and common sense and did not intend untoward results.").

On the other hand, Mr. Webber was not left without a remedy for the over-long initial commitment period. Apart from appealing, Mr. Webber could have requested a supplemental hearing under N.C. Gen. Stat. § 122C-274(e) (2007), which allows the trial court to "either reissue or change the commitment order or discharge the respondent and dismiss the case." A supplemental hearing would have been a proper method for bringing to the trial court's attention the fact that the commitment period specified in the initial order exceeded the maximum term provided in N.C. Gen. Stat. § 122C-271(b). Mr. Webber could then have requested that the trial court "change the commitment order" to a period of 90 days for the combined inpatient and outpatient commitments. N.C. Gen. Stat. § 122C-274(e).

In sum, we hold that in order to challenge the improper commitment period contained in the 21 May 2007 order, Mr. Webber was required to appeal that 2007 order pursuant to N.C. Gen. Stat. § 122C-272 or to request a supplemental hearing under N.C. Gen. Stat. § 122C-274(e). Mr. Webber may not undo subsequent recommitments by challenging the prior final 21 May 2007 order—entered by a court

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with personal and subject matter jurisdiction—that he elected not to appeal. As a consequence of his decision not to appeal that order, Judge Shuford had the authority to subsequently order his recommitment on 14 May 2008.

## II

[2] Mr. Webber next argues that Judge Shuford failed to make sufficient findings of fact to support the conclusion that Mr. Webber should be recommitted to another 180 days of outpatient treatment. N.C. Gen. Stat. § 122C-267(h) (2007) requires the trial court “to find by clear, cogent, and convincing evidence that the respondent meets the criteria specified in G.S. 122C-263(d)(1)” and to “record the facts which support its findings . . . .” “A trial court’s duty to record the facts that support its findings is ‘mandatory.’” *Booker*, 193 N.C. App. at 436, 667 S.E.2d at 304 (quoting *In re Koyi*, 34 N.C. App. 320, 321, 238 S.E.2d 153, 154 (1977)).

To support an order for outpatient commitment, the trial court must find by clear, cogent, and convincing evidence that the following criteria are met:

- a. The respondent is mentally ill;
- b. The respondent is capable of surviving safely in the community with available supervision from family, friends, or others;
- c. Based on the respondent’s psychiatric history, the respondent is in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness as defined by G.S. 122C-3(11); and
- d. The respondent’s current mental status or the nature of the respondent’s illness limits or negates the respondent’s ability to make an informed decision to seek voluntarily or comply with recommended treatment.

N.C. Gen. Stat. § 122C-263(d)(1) (2007). Mr. Webber challenges the sufficiency of the findings under N.C. Gen. Stat. § 122C-263(d)(1)(c) regarding whether, without treatment, his psychiatric condition would deteriorate and predictably result in dangerousness.

The statutory definition of “dangerousness” includes “dangerous to himself” as well as “dangerous to others.” N.C. Gen. Stat. § 122C-3(11) (2007). The term “dangerous to himself” means that within the relevant past:

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1. The individual has acted in such a way as to show:
  - I. That he would be unable, without care, supervision, and the continued assistance of others not otherwise available, to exercise self-control, judgment, and discretion in the conduct of his daily responsibilities and social relations, or to satisfy his need for nourishment, personal or medical care, shelter, or self-protection and safety; and
  - II. That there is a reasonable probability of his suffering serious physical debilitation within the near future unless adequate treatment is given pursuant to this Chapter. A showing of behavior that is grossly irrational, of actions that the individual is unable to control, of behavior that is grossly inappropriate to the situation, or of other evidence of severely impaired insight and judgment shall create a prima facie inference that the individual is unable to care for himself; or
2. The individual has attempted suicide or threatened suicide and that there is a reasonable probability of suicide unless adequate treatment is given pursuant to this Chapter; or
3. The individual has mutilated himself or attempted to mutilate himself and that there is a reasonable probability of serious self-mutilation unless adequate treatment is given pursuant to this Chapter.

Previous episodes of dangerousness to self, when applicable, may be considered when determining reasonable probability of physical debilitation, suicide, or self-mutilation.

N.C. Gen. Stat. § 122C-3(11)(a).

The statute defines the term “dangerous to others” to mean that within the relevant past

the individual has inflicted or attempted to inflict or threatened to inflict serious bodily harm on another, or has acted in such a way as to create a substantial risk of serious bodily harm to another, or has engaged in extreme destruction of property; and that there is a reasonable probability that this conduct will be repeated. Previous episodes of dangerousness to others, when applicable, may be considered when determining reasonable probability of future dangerous conduct. Clear, cogent, and

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convincing evidence that an individual has committed a homicide in the relevant past is prima facie evidence of dangerousness to others.

N.C. Gen. Stat. § 122C-3(11)(b).

Here, Judge Shuford checked the box on the printed form order indicating that Dr. Godfrey's 12 May 2008 report was being incorporated by reference as findings. In *Booker*, 193 N.C. App. at 437, 667 S.E.2d at 304, this Court addressed the use of the same form. The trial court in that case had checked the box incorporating the doctor's report as findings, as Judge Shuford did here. The *Booker* Court, in considering the sufficiency of the findings of fact, considered both the doctor's report and the findings added to the form by the trial judge. *Id.* We, therefore, do the same here.<sup>1</sup>

In *Booker*, this Court held that the trial court's findings with respect to the respondent's dangerousness to self and others were insufficient because the trial court failed to include any findings beyond the incorporated medical report, which only set out the respondent's sex, age, and race; that the respondent had a history of alcohol dependence; that he was admitted with a manic episode; and that he continued to be symptomatic with limited insight regarding his illness. *Id.*

In contrast to *Booker*, Dr. Godfrey, in his 12 May 2008 report, described his evaluation and treatment of Mr. Webber, stating:

I have been treating the patient noted above [who] has been under my care for several months. I have also read his history. He has a long documented history of dependable and predictable non-compliance with treatment recommendations due to lack of insight, resulting in hostile acting out requiring hospitalization due to a reasonable fear of harm to others in the community.

In the handwritten additions to the form order, Judge Shuford largely echoed Dr. Godfrey's opinions, finding that although Mr. Webber was benefitting from treatment, he did not recognize its benefits and likely would discontinue treatment if not ordered by a court to continue. Based on Mr. Webber's "prior medical history, and prior actions, as well as his current demeanor which indicates that he does not recognize his illness and the necessity of treatment," Judge

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1. Mr. Webber does not contend that the incorporation of Dr. Godfrey's report as the trial court's findings constitutes improper delegation of the court's fact-finding duty. This argument apparently was also not made in *Booker*.

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Shuford concluded that Mr. Webber's "condition would deteriorate and he could likely become a danger to himself or others."

The trial court's written findings, coupled with the findings "incorporated" from Dr. Godfrey's report, are sufficient to support the trial court's determination that, based on Mr. Webber's psychiatric history, he is in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness. Mr. Webber contends, however, that the findings are inadequate because the trial judge "did not provide any facts about Mr. Webber's medical history, prior actions, or demeanor that showed that his psychiatric condition would deteriorate or that he would become dangerous."

In order to support an order of outpatient commitment, N.C. Gen. Stat. § 122C-263(d)(1)(c) (emphasis added) requires the trial court to find by clear, cogent, and convincing evidence that "[b]ased on the respondent's psychiatric history, the respondent is in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness . . . ." Here, Judge Shuford made the findings set out in N.C. Gen. Stat. § 122C-263(d)(1)(c). In addition, Dr. Godfrey's report, incorporated by reference, stated that Dr. Godfrey had "read his history" and Mr. Webber "has a long documented history of dependable and predictable non-compliance with treatment recommendations due to lack of insight, resulting in hostile acting out requiring hospitalization due to a reasonable fear of harm to others . . . ."

In arguing that these findings are insufficient, Mr. Webber relies upon *In re Holt*, 54 N.C. App. 352, 354-55, 283 S.E.2d 413, 415 (1981), in which this Court concluded that the trial court's finding that "'respondent ha[d] made statements to her husband of a threatening nature'" was "insufficient to sustain a conclusion that respondent was dangerous to others." In holding that the finding was inadequate, the Court noted that "[t]here was no finding . . . and no evidence to support any finding that might have been made, as to when these statements were made, the nature of the threats they contained, or the danger to petitioner reasonably inferable therefrom." *Id.*

The flaw of the order in *Holt* was thus a failure of the trial court to make any finding indicating that the threats were recent and that, accordingly, the respondent was a present danger to others. Here, Dr. Godfrey's medical report, based upon his review of Mr. Webber's psychiatric history, which was incorporated by reference, provided the

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facts necessary to establish that Mr. Webber currently meets the criteria for outpatient commitment.

*Holt* does not support Mr. Webber's contention that Judge Shuford was required to make specific findings describing Mr. Webber's psychiatric history. "The trial court is not required to make a finding as to every fact that arises from the evidence but only to those facts which are material to the resolution of the dispute." *Church v. Church*, 119 N.C. App. 436, 438, 458 S.E.2d 732, 734 (1995). As our Supreme Court has explained, "[t]here are two kinds of facts: Ultimate facts, and evidentiary facts. Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense; and evidentiary facts are those subsidiary facts required to prove the ultimate facts." *Woodard v. Mordecai*, 234 N.C. 463, 470, 67 S.E.2d 639, 644 (1951). "An ultimate fact is the final resulting effect which is reached by processes of logical reasoning from the evidentiary facts." *Id.* at 472, 67 S.E.2d at 645. While the trial court is required to make "*specific findings* of the ultimate facts established by the evidence," it is not required to recite "the evidentiary and subsidiary facts required to prove the ultimate facts . . ." *Quick v. Quick*, 305 N.C. 446, 452, 290 S.E.2d 653, 658 (1982). We hold that the trial judge made the requisite ultimate findings of fact and did not, under the circumstances of this case, need to describe Mr. Webber's prior psychiatric history.

Mr. Webber next contends that Judge Shuford's finding that Mr. Webber "could likely" become dangerous does not equate to a finding—as dictated by N.C. Gen. Stat. § 122C-263(d)(1)(c)—that deterioration by Mr. Webber would "predictably result in dangerousness." Citing to dictionary definitions, Mr. Webber argues that "[f]inding that an act 'could' happen is not enough to establish that an act is 'predictable.'" In making this argument, Mr. Webber focuses on the trial judge's use of the word "could" and ignores the word "likely." The term "predictable" is defined as "capable of being foretold." *Webster's Third New International Dictionary* 1786 (1964). See *Perkins v. Arkansas Trucking Servs., Inc.*, 351 N.C. 634, 638, 528 S.E.2d 902, 904 (2000) ("In the absence of a contextual definition, courts may look to dictionaries to determine the ordinary meaning of words within a statute."). In turn, "likely" is defined as being "of such a nature or so circumstanced as to make something probable"; "seeming to justify belief or expectation"; "having a better chance of existing or occurring than not"; or "having the character of a probability." *Webster's Third New International Dictionary* 1310. We hold that the terms

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“could likely” and “predictably” are sufficiently synonymous. Judge Shuford’s findings of fact, therefore, met the statutory requirements.

Mr. Webber has not demonstrated that Judge Shuford’s order was inadequate. We hold that Judge Shuford’s handwritten findings of fact combined with Dr. Godfrey’s incorporated report provide sufficient detail to meet the statutory requirements and to permit appellate review.

## III

[3] In his final argument on appeal, Mr. Webber contends that “there was insufficient evidence to support the trial court’s findings that Mr. Webber’s condition would deteriorate and that he ‘could likely’ become dangerous.” When the trial court’s findings of fact are challenged on appeal, this Court’s “function . . . is simply to determine whether there was any competent evidence to support the factual findings made.” *In re Monroe*, 49 N.C. App. 23, 28, 270 S.E.2d 537, 539 (1980).

At the hearing on 12 May 2008, Mr. Webber testified that he would voluntarily continue treatment without a court order forcing him to do so. Based on this testimony, the trial court stated that it would “like to hear from Doctor Godfrey on that issue as to why he thinks [Mr. Webber] would not” voluntarily continue treatment.

Dr. Godfrey testified on 14 May 2008, stating that he had studied Mr. Webber’s long history of treatment for mental illness and had diagnosed him with a psychotic disorder NOS. Dr. Godfrey explained that he relied on Mr. Webber’s psychiatric history because that is “basically what medicine does” and “medicine is basically history.” As the basis for his medical opinion that Mr. Webber required continued outpatient treatment, Dr. Godfrey cited his history of “drift[ing] away” from voluntary treatment, indicating that “he would go off medication and become ill again and go back to Broughton.” Dr. Godfrey also noted that “[Mr. Webber’s] history indicates that he doesn’t follow a doctor’s advice. He follows the court orders.”

Dr. Godfrey testified, in addition, that Mr. Webber’s history included incidents of threatened violence that resulted in inpatient commitment. The doctor explained that Mr. Webber’s history “[i]nvolve[d] angry letter writing” and that the people mentioned in the letters—“judges and local individuals”—felt that they were being threatened. Dr. Godfrey expressed his opinion that if Mr. Webber “unilaterally” stopped treatment, “within a few months, he

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would display the behaviors that caused him to be committed to in-patient treatment would occur again [sic] and then I would probably see him post hospitalization.”

Dr. Godfrey also discussed his direct interactions with Mr. Webber, pointing out that Mr. Webber lacked insight into the benefit of his medical treatment. Mr. Webber told the doctor that he did not believe that he needed any medication. In explaining why that statement suggested a need for continued outpatient commitment, Dr. Godfrey testified that he could not “see why anyone would continue something they see no benefit in without some structure to ensure it. People just don’t do that.” According to Dr. Godfrey, even though Mr. Webber had undergone six months of outpatient treatment, Mr. Webber had not “moved any closer to feeling that medication is benefitting him.”

Mr. Webber contends that Dr. Godfrey’s testimony regarding Mr. Webber’s history of violence and communication of threats is incompetent evidence because it is based on hearsay. Mr. Webber did not object to the admission of Dr. Godfrey’s testimony on any basis, much less on the ground that it was impermissible hearsay. Mr. Webber thus failed to preserve this issue for appellate review. N.C.R. App. P. 10(b)(1); *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 195-96, 657 S.E.2d 361, 364 (2008).

In any event, Dr. Godfrey testified as an expert witness. Rule 703 of the Rules of Evidence provides: “The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.” The Supreme Court has held that it is appropriate for a psychiatrist to base an expert opinion on both the psychiatrist’s personal examination of the patient and other information included in the patient’s official medical records. *State v. DeGregory*, 285 N.C. 122, 134, 203 S.E.2d 794, 802 (1974).

Dr. Godfrey testified that he learned of Mr. Webber’s “angry letters” and incidents of threatened violence through the medical history provided by another doctor at Mr. Webber’s outpatient treatment facility who “ha[d] known [Mr. Webber] for a long time and read his writings when he was not medicated . . . .” This kind of information is precisely the type that a medical expert may use as the basis for the expert’s opinion. See *State v. Daniels*, 337 N.C. 243, 269, 446 S.E.2d

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298, 314 (1994) (holding that psychiatrist may properly base expert opinion—without personally evaluating defendant—on “(1) her review of the evaluations of other doctors who had interviewed defendant; (2) a personal discussion with a doctor in whose care defendant had been placed; and (3) interviews of defendant’s friends, employers, and family”), *cert. denied*, 513 U.S. 1135, 130 L. Ed. 2d 895, 115 S. Ct. 953 (1995); *DeGregory*, 285 N.C. at 132, 203 S.E.2d at 801 (“[A]n expert witness has wide latitude in gathering information and may base his opinion on evidence not otherwise admissible.”).

Mr. Webber nevertheless cites to *Hatley*, for the proposition that Dr. Godfrey’s testimony was incompetent and inadmissible because it “rested on second-hand information and speculation.” The distinguishing factor between *Hatley* and this case, however, is the fact that in *Hatley*, 291 N.C. at 696, 231 S.E.2d at 635, “[t]he only witness to appear at the commitment hearing in District Court was . . . the mother and neighbor of respondent”—not expert witnesses.

N.C. Gen. Stat. § 122C-263(d)(1)(c), moreover, requires the doctor to rely on the respondent’s psychiatric history. As mandated by the statute, the doctor must determine, “[b]ased on the respondent’s psychiatric history, [that] the respondent is in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness as defined by G.S. 122C-3(11)[.]” *Id.*

Mr. Webber next argues that there is insufficient evidence of his medical history to support the trial court’s finding that Mr. Webber’s condition would deteriorate and that he would predictably become dangerous. Evidence of Mr. Webber’s medical history came in through the expert testimony of Dr. Godfrey, who had reviewed Mr. Webber’s history. Mr. Webber cites no authority requiring that a respondent’s medical history be admitted separately from the expert’s testimony based on that history. Although Mr. Webber argues that Dr. Godfrey’s testimony is “too attenuated to support a finding that Mr. Webber could become dangerous to others,” the credibility and weight to be given to the doctor’s testimony is an issue for the trial court, as the fact-finder, to resolve. *See Scott v. Scott*, 336 N.C. 284, 291, 442 S.E.2d 493, 497 (1994) (“Questions of credibility and the weight to be accorded the evidence remain in the province of the finder of facts.”). The definition of dangerousness, moreover, provides that “[p]revious episodes of dangerousness” are a proper consideration for the trial court in making its determination. N.C. Gen. Stat. § 122C-3(11)(a), (b).

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Finally, Mr. Webber contends that Dr. Godfrey only gave a “bare” opinion of dangerousness and that such “conjecture” is inadequate to support the trial court’s commitment order. In support of this contention, Mr. Webber points to *In re Hogan*, 32 N.C. App. 429, 232 S.E.2d 492 (1977), and *In re Salem*, 31 N.C. App. 57, 228 S.E.2d 649 (1976), two cases in which this Court held that there was insufficient evidence of imminent dangerousness to self or others. Both *Hogan* and *Salem*, however, presented distinctly different scenarios than the one in this case.

In *Hogan*, 32 N.C. App. at 434, 232 S.E.2d at 495, the only evidence of dangerousness was the evaluation report of the psychiatrist who examined the respondent when she was first taken into custody. In his report, the psychiatrist simply asserted, without explanation, his opinion that the respondent was imminently dangerous to herself or others. *Id.* At the subsequent commitment hearing, however, the psychiatrist contradicted the opinion given in his report, explaining that he “arrived at his opinion that respondent was imminently dangerous to herself or others solely because he felt that her persistence in trying to [religiously] convert someone on the street might cause that person to resist the idea, so that ‘they could become physically aggressive toward her.’ ” *Id.*

In *Salem*, the only evidence relating to dangerousness with respect to one of the respondents was the report of a doctor in which he stated only that the respondent “ ‘appears mentally unable [to] care for self & probably of imminent danger to self.’ ” 31 N.C. App. at 61, 228 S.E.2d at 652 (emphasis omitted). No witness testified at the hearing. *Id.* at 58, 228 S.E.2d at 650. In vacating the commitment, the *Salem* Court concluded that “[s]uch evidence is not clear, cogent and convincing.” *Id.* at 61, 228 S.E.2d at 652.

Unlike *Hogan* and *Salem*, Dr. Godfrey’s testimony went beyond the conclusory assertion that if Mr. Webber failed to continue treatment, his condition would deteriorate and would predictably result in dangerousness. Dr. Godfrey testified that he had studied Mr. Webber’s psychiatric history and had personally treated him for several months. He specifically described his interactions with Mr. Webber and statements made by Mr. Webber relating to his outpatient treatment. Dr. Godfrey then explained, based on Mr. Webber’s psychiatric history and his experience with Mr. Webber, why he believed that if Mr. Webber were not recommitted, he would “drift[] away” from outpatient treatment. Dr. Godfrey then expressed his expert opinion, based on Mr. Webber’s history, that if Mr. Webber failed to continue

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treatment, he would display the hostile and aggressive behaviors that led him to be previously committed to inpatient care. A review of Dr. Godfrey's testimony reveals that his evidence went well beyond the naked opinions found to be inadequate in *Hogan* and *Salem*.

Moreover, Judge Shuford's findings of fact were further supported by Mr. Webber's own testimony at the recommitment hearing. When asked by his trial counsel about his treatment with Dr. Godfrey, Mr. Webber responded: "I call it mistreated but according to what terms y'all use, treated is—is correct." Mr. Webber stated that the medication he was taking has "done absolutely nothing to change [him] whatsoever." He explained that he was being prescribed the medication because Dr. Godfrey believed he needed it and because "that's what the Court ordered."

When asked whether he could make decisions for himself regarding his treatment, Mr. Webber responded: "I've been making decisions for myself. I—I've never let nobody make decisions for me unless it involves the Court. When they make the decision, then there's nothing that I can do. Otherwise, I'm totally to my own self. I make all of my own decisions."

When Mr. Webber's trial counsel asked him about whether he believed he was a danger to himself or others, Mr. Webber responded: "I'm not a normal human being, is the way I see it. I—I am abnormal in this society. In this abnormal society." Mr. Webber's counsel also asked whether he ever wanted to physically hurt someone when he got angry, to which Mr. Webber responded: "That comes with the territory."

Dr. Godfrey's testimony, in conjunction with Mr. Webber's own testimony, provides sufficient support for the trial court's determination under N.C. Gen. Stat. § 122C-263(d)(1)(c) that based on his psychiatric history Mr. Webber's "condition would deteriorate and he could likely become a danger to himself or others." See *In re Zollicoffer*, 165 N.C. App. 462, 468-69, 598 S.E.2d 696, 700 (2004) (upholding determination of dangerousness where expert witness' testimony and "incorporate[d]" report indicated that "respondent has a history of chronic paranoid schizophrenia, that respondent admits to medicinal non-compliance which puts him 'at high risk for mental deterioration,' that respondent does not cooperate with his treatment team, and that he 'requires inpatient rehabilitation to educate him about his illness and prevent mental decline' ").

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We also note that Mr. Webber's arguments could be read as suggesting that the evidence does not establish that Mr. Webber is, in fact, dangerous. Under N.C. Gen. Stat. § 122C- 263(d)(1)(c), however, the State was only required to prove that Mr. Webber "is in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness as defined by G.S. 122C-3(11)[.]" As our review of the record indicates that the State met its burden of proof, we affirm the trial court's order.

Affirmed.

Judges ROBERT C. HUNTER and STEELMAN concur.

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STATE OF NORTH CAROLINA v. JAMES CHRISTOPHER STITT, DEFENDANT

No. COA09-90

(Filed 8 December 2009)

**1. Indictment and Information— short-form indictment—  
sufficient—first-degree murder**

A short-form indictment notified defendant that he was being charged with first-degree murder and set out the requisite elements pursuant to N.C.G.S. § 15-144. Specifically alleging premeditation and deliberation is not required.

**2. Appeal and Error— admission of evidence—no findings at  
suppression hearing—review de novo**

The trial court's legal determination that telephone records were admissible was reviewed *de novo* on appeal where neither party presented evidence pertaining to the suppression motion, no findings of fact were made, and defendant did not assign error to the trial court's failure to make findings.

**3. Constitutional Law— Fourth Amendment standing—mere  
possession of property**

A first-degree murder defendant did not have standing to assert Fourth Amendment violations in the admission of cellular telephone records where the telephones found in defendant's possession were owned by one of the victims. Neither ownership nor a possessory interest will be assumed from mere possession.

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**4. Evidence— telephone records—federal violations in obtaining—no suppression remedy**

Even if the State violated the federal Stored Communications Act in obtaining telephone records in a first-degree murder prosecution, there is no suppression remedy under federal law.

**5. Appeal and Error— preservation of issues—argument not raised at trial—not considered**

An argument concerning the necessity of a subpoena to secure telephone records was not considered on appeal where it was not raised at trial.

**6. Evidence— photographs of crime scene—admissible**

Four photographs of first-degree murder victims at the crime scene were properly admitted where the photos showed different perspectives on the crime scene, focused on different pieces of evidence, twenty-three other photographs were admitted without objection, and the photos were used for illustrative purposes only and not to inflame the jury.

**7. Homicide— second-degree murder—deadly weapon—heat of passion**

The trial court did not err by denying defendant's motion to dismiss a second-degree murder charge where defendant used a deadly weapon but there was some evidence of heat of passion. That evidence converts the presumption of malice raised by the use of a deadly weapon to a permissible inference and does not mean that the State failed to present sufficient evidence of second-degree murder.

**8. Homicide— first-degree murder—premeditation and deliberation—sufficiency of evidence**

There was sufficient evidence of premeditation and deliberation, and the court correctly denied defendant's motion to dismiss a first-degree murder charge, where the evidence showed a time for reflection during which defendant decided to return to the victims' home, and that this victim was shot twice at close range, which required multiple trigger pulls.

**9. Homicide— first-degree murder—voluntary manslaughter instruction—not given**

The trial court did not err by refusing to instruct the jury on voluntary manslaughter in a first-degree murder prosecution

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where defendant relied on precedent involving provocation and a disposition that did not cool. Here, there was a time lapse between defendant's argument with the victims and the shootings and testimony that defendant shot this victim because she was screaming and not because of the prior altercation.

**10. Robbery— murder—continuous transaction**

Two killings and a robbery occurred in one continuous transaction, and the trial court did not err by denying defendant's motion to dismiss the charge of robbery with a dangerous weapon, where there was substantial evidence that defendant used a deadly weapon to kill the victims and took their property not as an afterthought but with the intent of utilizing and selling it.

**11. Robbery— taking of property—no intent to return**

There was sufficient evidence in a robbery and murder prosecution to show that defendant took an automobile and other property out of state with no intent of returning them.

**12. Criminal Law— flight—evidence sufficient**

There was sufficient evidence for an instruction on flight after two murders and robberies where defendant claimed that traveling to New York was his standard practice but he varied his normal behavior in this case. Other reasonable explanations for defendant's conduct do not render the instruction improper; flight is merely evidence of guilt, not a presumption.

Appeal by defendant from judgments entered 15 May 2008 by Judge Gregory A. Weeks in Cumberland County Superior Court. Heard in the Court of Appeals 14 September 2009.

*Attorney General Roy A. Cooper, III, by Assistant Solicitor General John F. Maddrey, for the State.*

*William D. Spence for defendant-appellant.*

HUNTER, Robert C., Judge.

On or about 5 February 2005, Jenna Bologna ("Bologna") and George Katsigiannis ("Katsigiannis") were fatally shot with a handgun in Cumberland County, North Carolina. On 13 June 2005, James Christopher Stitt ("defendant") was indicted on charges of robbery with a dangerous weapon and two counts of first degree murder in

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connection with the deaths of Bologna and Katsigiannis. On 8 May 2008, defendant was convicted by a jury of first degree murder of Bologna, second degree murder of Katsigiannis, and robbery with a dangerous weapon. After careful review, we find no error.

**Background****A. Fayetteville, North Carolina**

The State presented evidence at trial tending to show that defendant lived with Bologna and Katsigiannis in Fayetteville, North Carolina at the time of their deaths. On 4 February 2005, at approximately 9:00 p.m., defendant, Katsigiannis, Bologna, Alexandria Hosborough (“Alexandria”), and Samantha Callahan, went to the home of Nina Hosborough (“Nina”) to look at a set of custom wheels for sale. They left Nina’s house at approximately 11:00 p.m.

The following day, 5 February 2005, defendant drove Katsigiannis’ car to Alexandria’s house to return books she left in the car the previous night. Defendant told Alexandria that he was going to Virginia and requested directions to Interstate 95. Later that day, defendant called Alexandria from Katsigiannis’ cellular telephone. He called her again from that telephone the following night from New York. Defendant also used Katsigiannis’ telephone to call his girlfriend, Bonnie Tam (“Tam”) to inform her that he was on his way to New York.

On 7 February 2005, Katsigiannis did not report to physical training at Fort Bragg where he was stationed with the U.S. Army. Adam Altimus (“Altimus”) and Jacob Cymbala (“Cymbala”), members of Katsigiannis’ military unit, were concerned and went to his house to check on him. Altimus also called Katsigiannis’ telephone, but did not get an answer. Altimus and Cymbala then left the house without ever entering the home or making contact with Katsigiannis. Joseph Bishop (“Bishop”) also visited Katsigiannis’ house that same day and did not receive an answer when he knocked on the front door.

The next day, Katsigiannis still did not report for physical training. Bishop called Katsigiannis’ cellular telephone twice that morning and defendant answered on the second attempt. Bishop asked defendant if he knew where Katsigiannis was, and defendant told Bishop that Katsigiannis was at home in Fayetteville, and that defendant was in New York.

Thereafter, Altimus, Bishop, and Cymbala went back to Katsigiannis’ house. They peered into a window and saw what

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appeared to be a foot on the floor. The men immediately notified their superiors, Sergeant Bruce and Chief Davis, of what they saw. Upon arriving and looking through the window, Sergeant Bruce opened the back door to the residence with a credit card so they could search the house for Katsigiannis. Bologna's body was found in the master bedroom, and Katsigiannis' body was found lying on the floor of the master bathroom.

At the scene, detectives found three fired shell casings from a .45 caliber handgun in the master bedroom. One was found on the floor, another was found behind the bed's headboard, and the last shell casing was found on the bed. The detectives also found a fired bullet inside the pillow where it was believed Bologna's head had been resting. Later investigations indicated that Katsigiannis bought a .45 caliber handgun from a pawn shop in Cumberland County on 1 February 2005.

While at the scene of the crime on 8 February 2005, a local Fayetteville law enforcement officer called Katsigiannis' cellular telephone. Defendant answered the telephone and told the police that he was in Brooklyn, near a park at the intersection of 79th Street and Shore Road. After inquiring about Katsigiannis' car, defendant told the police that Katsigiannis allowed him to borrow his car and cellular telephone.

**B. Brooklyn, New York**

Defendant arrived at Tam's house in Brooklyn, New York around 9:00 p.m. on 5 February 2005. Tam was the only person to testify at trial regarding the events leading up to the murders, which she claimed were told to her by defendant. Tam testified that once she and defendant were together in New York, defendant told her that "George and Jenna [were] dead." Defendant explained to Tam that he and Bologna began arguing because she was bothering him while he was watching television. Defendant said that Bologna began smacking him, so he hit her, knocking out a tooth. Katsigiannis observed the incident, then left the room. Defendant suspected that he was going to get his gun, so defendant ran out of the back door. By this time, Katsigiannis was already shooting at him but stopped once defendant reached the woods at the rear of the house. Katsigiannis then dropped the gun and went back inside the house. Defendant claimed that he retrieved the gun from the ground and entered the house with it. Defendant told Tam that he shot Katsigiannis first in the chest and then proceeded to shoot Bologna in the head and chest because she was screaming.

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While in New York, defendant and Tam drove to Owls Park. When they arrived at the park, defendant showed Tam a box with a gun inside and stated, “[t]his was the gun.” Tam and defendant laid the box containing the gun under a tree and covered it with an article of clothing and a pillow they found in the park.

On 9 February 2005, a Brooklyn detective contacted Tam regarding the murder investigation, and she gave a statement at the police station. Tam also led police to Owls Park where the gun was located. Tam later testified that defendant had DVDs in the car with him when he arrived in New York. Subsequently, when defendant was arrested, officers found the cellular telephone belonging to Katsigiannis on defendant’s person.

Telephone records confirmed time and place testimonies by various witnesses. An expert in toolmarks and firearms testified that all three of the cartridge casings found at Katsigiannis’ home, as well as the bullet retrieved from Bologna’s body, were fired from Katsigiannis’ gun.

No evidence was offered by defendant. Defendant was found guilty of first degree murder of Bologna, second degree murder of Katsigiannis, and robbery with a firearm. Defendant was sentenced to life imprisonment without parole for the first degree murder conviction, 189 months to 236 months imprisonment for the second degree murder conviction, and 77 to 100 months imprisonment for the robbery with a firearm conviction.

Analysis

## I. Short-Form Indictment

[1] Defendant first argues that the trial court erred in refusing to dismiss the short-form indictment because the indictment did not include the requisite elements of premeditation and deliberation to charge him with first degree murder, nor did it allege the elements of felony murder. Consequently, defendant claims that the trial court was deprived of jurisdiction.

North Carolina Courts have “consistently held that the short-form first-degree murder indictment serves to give a defendant sufficient notice of the nature and cause of the charges against him or her.” *State v. Squires*, 357 N.C. 529, 537, 591 S.E.2d 837, 842 (2003), *cert. denied*, 541 U.S. 1088, 159 L. Ed. 2d 252 (2004). N.C. Gen. Stat. § 15-144 (2007) expressly states, “it is sufficient in describing murder to allege that the accused person feloniously, willfully, and of his mal-

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ice aforethought, did kill and murder (naming the person killed), and concluding as is now required by law[.]” Specifically alleging premeditation and deliberation is not required by the statute. *Id.*

The indictment at issue stated that “on or about the 5th day of February, 2005, in the County named above the defendant named above unlawfully, willfully and feloniously did of malice aforethought kill and murder George Daniel Katsigiannis. This act was in violation of North Carolina General Statutes Section 14-17.” Here, the indictment notified defendant that he was being charged with first degree murder and set out the requisite elements pursuant to N.C. Gen. Stat. § 15-144.

Defendant acknowledges that this issue has been decided against him. *State v. Avery*, 315 N.C. 1, 14, 337 S.E.2d 786, 793 (1985) (holding, “[t]he indictment in question complies with the short form indictment authorized by [N.C. Gen. Stat. §] 15-144 and is therefore sufficient to charge first degree murder without specifically alleging premeditation and deliberation or felony murder”); *State v. Braxton*, 352 N.C. 158, 175, 531 S.E.2d 428, 438 (2000); *State v. Smith*, 152 N.C. App. 29, 34, 566 S.E.2d 793, 797, *cert. denied*, 356 N.C. 311, 571 S.E.2d 208 (2002).

Nevertheless, defendant asks us to reexamine the issue. “As we are bound by the decisions of the Supreme Court, as well as those already decided by other panels of this Court, we refuse to do so. Accordingly, we overrule th[is] assignment[] of error.” *Smith*, 152 N.C. App. at 34, 566 S.E.2d at 797 (citations omitted).

## II. Suppression of Telephone Records

[2] Defendant also appeals the trial court’s denial of his motion to suppress the cellular telephone records obtained by the State.<sup>1</sup> Defendant presents three arguments on appeal: (1) the trial court erred in determining that defendant did not have standing to assert a violation of his Fourth Amendment rights; (2) the State failed to comply with federal law when it sought a court order to obtain the records; and (3) the State violated state law in obtaining the records without a subpoena.<sup>2</sup>

“In reviewing a trial court’s ruling on a motion to suppress, we first determine whether the trial court’s findings of fact are supported

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1. The record indicates that defendant was in possession of two telephones registered in Katsigiannis’ name.

2. The court order is not provided in the record on appeal.

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by competent evidence.” *State v. Bowden*, 177 N.C. App. 718, 721, 630 S.E.2d 208, 210 (2006). Here, the trial court received a written motion to suppress from defendant and heard arguments from the parties prior to opening statements at trial; however, the trial court made no findings of fact.

When the trial court conducts an evidentiary hearing regarding the competency of the evidence, the trial court is required to make findings of fact if there is a conflict in the evidence. When, however, there is no conflict in the evidence, findings are not required, although it is preferable for the trial court to make them.

*Id.* (citations and quotation marks omitted). Defendant does not assign error to the trial court’s failure to make findings of fact. In fact, no evidence was presented by either party pertaining to the motion; however, defendant submitted an affidavit attached to his written motion in which he claimed a “possessory and privacy interest in the information sought” by the State and further alleged a violation of federal law. Since no findings of fact were made, we will only review *de novo* the trial court’s legal determination that the records were admissible. *State v. Wilkerson*, 363 N.C. 382, 434, 683 S.E.2d 174, 205 (2009).

[3] First, we address defendant’s claim that he had standing to assert a Fourth Amendment violation. Defendant argued before the trial court that his possession of the cellular telephones was sufficient to establish a reasonable expectation of privacy in the records. Upon hearing arguments by defense counsel and the State, the trial court stated: “[A] defendant making a motion like the motion now before the Court bears the burden of establishing that he, separate and apart from any affidavit, gained possession from the owner or someone with authority to grant possession[.]” The trial court ultimately concluded that defendant did not have standing to assert a Fourth Amendment violation. We agree.

“In order to challenge the reasonableness of a search or seizure, defendant must have standing. Standing requires *both* an ownership or possessory interest *and* a reasonable expectation of privacy.” *State v. Swift*, 105 N.C. App. 550, 556, 414 S.E.2d 65, 68-69 (1992) (emphasis added); *accord State v. McKinney*, 361 N.C. 53, 56, 637 S.E.2d 868, 871 (2006) (“A defendant has standing to contest a search if he or she has a reasonable expectation of privacy in the property to be searched.”).

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To be entitled to the protections of the Fourth Amendment, defendant ‘must demonstrate that any rights alleged to have been violated were his rights, not someone else’s.’ Generally, a defendant may not object to the search and seizure of the property of another. ‘The burden of showing this ownership or possessory interest is on the person who claims that his rights have been infringed.’

*State v. Boyd*, 169 N.C. App. 204, 206-07, 609 S.E.2d 785, 787 (2005) (quoting *State v. Mlo*, 335 N.C. 353, 377-78, 440 S.E.2d 98, 110-11, *cert. denied*, 512 U.S. 1224, 129 L. Ed. 2d 841 (1994)).

Here, defendant offered no evidence at the suppression hearing, and points to none on appeal, to demonstrate that he had an ownership interest in the cellular telephones or had been given a possessory interest by the legal owner. Defendant only maintained that he had possession of the telephones and consequently an expectation of privacy in the records related to those telephones. Defendant did not go so far as to claim that Katsigiannis lent him the telephones. Our Courts will not assume ownership or a possessory interest in property based on mere possession. *Id.* at 207, 609 S.E.2d at 787 (recognizing that a “temporary use of property does not automatically create an expectation of privacy in that property”). In sum, defendant did not meet his burden of establishing an ownership or possessory interest in the telephones. Accordingly, the trial court did not err in determining that defendant lacked standing to claim a Fourth Amendment violation.<sup>3</sup>

**[4]** Second, we address defendant’s claim that the State violated federal law in obtaining the records. Defendant asserts that when the Cumberland County Sheriff’s Office sought court authorization to obtain the records, they did not fully comply with 18 U.S.C. § 2703(d) (2006) of the Stored Communications Act, which governs disclosure of customer communications or records and states in pertinent part:

A court order for disclosure under subsection (b) or (c) may be issued by any court that is a court of competent jurisdiction and shall issue only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication,

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3. Having found that defendant did not have standing to assert a Fourth Amendment violation due to a lack ownership or possessory interest in the telephones, we need not address whether any expectation of privacy was in fact reasonable, or whether that expectation was violated.

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or the records or other information sought, are relevant and material to an ongoing criminal investigation.

Specifically, defendant argues that when the State obtained the court order requiring Nextel to release the telephone records, the State failed to establish that the records were relevant and material to an ongoing criminal investigation. Defendant claims that the trial court failed to reach the issue of whether the records were unlawfully obtained under federal statute and instead concentrated on the Constitutional standing of defendant to raise the Fourth Amendment claim. Defendant is correct in that the trial court did not make any conclusions of law specifically pertaining to this portion of defendant's claim; however, we review *de novo* the legal determination to deny the motion.

There is no evidence in the record regarding the State's conduct in this matter. Nevertheless, assuming *arguendo* that the State did not fully comply with 18 U.S.C. 2703(d), there is no suppression remedy under federal law. 18 U.S.C. § 2707(a) (2006) provides that a party "aggrieved" by a violation of the Act may pursue a civil remedy against "the person or entity, other than the United States, which engaged in that violation . . . ." 18 U.S.C. § 2708 (2006) states, "[t]he remedies and sanctions described in this chapter are the only judicial remedies and sanctions for nonconstitutional violations of this chapter."

The United States District Court for the District of Columbia analyzed the same issue presently before this Court and held that even if the State does not comply with the provisions of the Stored Communications Act, "the statute does not provide for a suppression remedy." *United States v. Ferguson*, 508 F.Supp. 2d. 7, 10 (D.D.C. 2007); *see also United States v. Smith*, 155 F.3d 1051, 1056 (9th Cir. 1998) (holding that "the Stored Communications Act does *not* provide an exclusion remedy. It allows for civil damages . . . and criminal punishment . . . but nothing more"), *superseded on other grounds, Konop v. Hawaiian Airlines, Inc.*, 236 F.3d 1035 (9th Cir. 2001).<sup>4</sup> Upon review of the Act and relevant case law, we hold that the trial court did not err in suppressing the telephone records despite an alleged violation of 18 U.S.C. § 2703(d).

[5] Finally, defendant asserts that N.C. Gen. Stat. § 15A-298 (2007) requires a subpoena to secure telephone records, and since no sub-

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4. In his criminal law treatise, Professor Robert Farb notes that "[a] violation of federal law does not require the exclusion of evidence at a criminal trial." Robert L. Farb, *Arrest, Search, and Investigation in North Carolina*, 106 n. 129 (3rd ed. 2003).

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poena was issued in this case, the evidence should have been suppressed pursuant to N.C. Gen. Stat. § 15A-974(2) (2007) (stating that evidence must be suppressed if “[i]t [was] obtained as a result of a substantial violation of the provisions of [Chapter 15]”). Defendant did not raise this argument before the trial court, and we will not consider it on appeal. N.C. R. App. P. 10(b)(1); *see also State v. Barnard*, 184 N.C. App. 25, 33, 645 S.E.2d 780, 785 (2007), *aff’d*, 362 N.C. 244, 658 S.E.2d 643 (2008).

## III. Introduction of Photographs

[6] Next, defendant argues that the trial court erred in allowing the State to introduce into evidence four photographs of the deceased victims at the crime scene. Defendant filed a motion *in limine* claiming that the photographs were unnecessarily gruesome and carried no probative value. The trial court considered the matter at trial. The State selected thirty crime scene photographs, from over one hundred taken, to present to the jury. Defendant objected to seven of the proffered photographs, and upon review of the photographs and the State’s arguments concerning each one, the trial court excluded three of the photographs but allowed the State to introduce the other four. The State claims that the photographs were relevant to illustrate testimony concerning the location of a fired cartridge case in relation to Bologna’s body, the hole in the pillow where Bologna’s head was resting, the position of Katsigiannis’ body on the bathroom floor, and to provide a different angle so that the jury could clearly see what Katsigiannis was wearing at the time of his death.

“In determining whether to admit photographic evidence, the trial court must weigh the probative value of the photographs against the danger of unfair prejudice to defendant [pursuant to Rule 403 of the North Carolina Rules of Evidence].” *State v. Blakeney*, 352 N.C. 287, 309, 531 S.E.2d 799, 816 (2000). Rule 403 provides, “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” N.C. Gen. Stat. § 8C-1, Rule 403 (2007). “We review a trial court’s decision to [admit or] exclude evidence under Rule 403 for abuse of discretion.” *State v. Whaley*, 362 N.C. 156, 160, 655 S.E.2d 388, 390 (2008). “An abuse of discretion results when ‘the court’s ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.’ ” *Id.* (quoting *State v. Peterson*, 361 N.C. 587, 602-03, 652 S.E.2d 216, 227 (2007)).

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It is well established that “[p]hotographs of a homicide victim may be introduced even if they are gory, gruesome, horrible or revolting, so long as they are used for illustrative purposes and so long as their excessive or repetitious use is not aimed solely at arousing the passions of the jury.” *Blakeney*, 352 N.C. at 309-10, 531 S.E.2d at 816 (quoting *State v. Hennis*, 323 N.C. 279, 284, 372 S.E.2d 523, 526 (1988)); see also *State v. Porth*, 269 N.C. 329, 337, 153 S.E.2d 10, 16 (1967); *State v. Curtis*, 7 N.C. App. 707, 709, 173 S.E.2d 613, 615 (1970); *State v. McCain*, 6 N.C. App. 558, 562, 170 S.E.2d 531, 533 (1969).

“ ‘A photograph of the scene of a crime may be admitted into evidence if it is identified as portraying the locale with sufficient accuracy.’ ” *State v. Haselden*, 357 N.C. 1, 14, 577 S.E.2d 594, 603 (quoting *State v. Smith*, 300 N.C. 71, 75, 265 S.E.2d 164, 167 (1980)), cert. denied, 540 U.S. 988, 157 L. Ed. 2d 382 (2003). “Even where a body is in advanced stages of decomposition and the cause of death and identity of the victim are uncontroverted, photographs may be exhibited showing the condition of the body and its location when found.” *State v. Wynne*, 329 N.C. 507, 517, 406 S.E.2d 812, 816-17 (1991).

The case of *State v. Bowman*, 183 N.C. App. 631, 644 S.E.2d 596, cert. denied, 361 N.C. 570, 650 S.E.2d 816 (2007), is analogous in many respects to the present case. There, the State presented more than thirty photographs of the victim’s body without objection by defendant. *Id.* at 634, 644 S.E.2d at 598. Defendant only objected to six photographs, which showed the victim in a different position than in the other photographs. *Id.* This Court found no abuse of discretion and reasoned that: (1) defendant failed to object to numerous other photographs of the crime scene; (2) the challenged photographs showed a different perspective of the scene and different pieces of evidence than the other photographs admitted; and (3) the photographs were meant to illustrate the testimony of the investigating officer. *Id.* at 634, 644 S.E.2d at 599.

Here, defendant did not object to the other twenty-three photographs of the crime scene, and the four he did object to depicted different perspectives of the crime scene and focused on different pieces of evidence. Moreover, we find that the State made use of the photographs in conjunction with testimony for illustrative purposes only and that the photographs were not used to inflame the jury’s passions. Accordingly, we find no error in the admission of the four photographs to which defendant objected.

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## IV. Sufficient Evidence to Establish Murder of Katsigiannis

[7] Defendant argues that the trial court erred in denying his motion to dismiss the charge of second degree murder of Katsigiannis at the close of the State's evidence (being all the evidence) on the grounds that the evidence was insufficient to establish every element of the crime. The trial court submitted to the jury the charges of first degree murder, second degree murder, and voluntary manslaughter.

In determining the sufficiency of the evidence to withstand a motion to dismiss and to be submitted to the jury, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. Substantial evidence is such relevant evidence as is necessary to persuade a rational juror to accept a conclusion. The trial court must review the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom.

*Squires*, 357 N.C. at 535, 591 S.E.2d at 841 (citations and quotation marks omitted).

"Murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation." *State v. Foust*, 258 N.C. 453, 458, 128 S.E.2d 889, 892 (1963) (citations omitted). Our Supreme Court has held that the "[i]ntent to kill is not a necessary element of second-degree murder, but there must be an intentional act sufficient to show malice." *State v. Rich*, 351 N.C. 386, 395, 527 S.E.2d 299, 304 (2000) (quoting *State v. Brewer*, 328 N.C. 515, 522, 402 S.E.2d 380, 385 (1991)). In this State, malice is implied when the perpetrator uses a deadly weapon to commit the murder. *State v. Reynolds*, 307 N.C. 184, 190, 297 S.E.2d 532, 535-36 (1982); *State v. West*, 180 N.C. App. 664, 668, 638 S.E.2d 508, 511 (2006), *appeal dismissed and disc. review denied*, 361 N.C. 368, 644 S.E.2d 562 (2007).

"The effect of the presumption is to impose upon the defendant the burden of going forward with or producing some evidence of a lawful reason for the killing or an absence of malice; *i.e.*, that the killing was done in self-defense or in the heat of passion upon sudden provocation." *Reynolds*, 307 N.C. at 190, 297 S.E.2d at 536 (quoting *State v. Simpson*, 303 N.C. 439, 451, 279 S.E.2d 542, 550 (1981)). "Even though such an inference is permissible, the State

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continues to bear the burden of showing defendant committed an unlawful killing.” *State v. Banks*, 191 N.C. App. 743, 751, 664 S.E.2d 355, 361 (2008).

Evidence raising an issue on the existence of malice and unlawfulness causes the presumption to disappear, “leaving only a permissible inference which the jury may accept or reject.” Furthermore, if there is any evidence of heat of passion on sudden provocation, either in the State’s evidence or offered by the defendant, the trial court must submit the possible verdict of voluntary manslaughter to the jury.

*State v. Weeks*, 322 N.C. 152, 173, 367 S.E.2d 895, 907-08 (1988) (quoting *Reynolds*, 307 N.C. at 190, 297 S.E.2d at 536).

Here, defendant argues that Tam’s testimony established that heat of passion existed in lieu of malice. Tam testified that defendant and Bologna were arguing, the disagreement escalated, and the two struck each other. Katsigiannis then attempted to shoot defendant, but he escaped into the woods. Katsigiannis put the gun down, and returned to the house. Defendant remained in the woods for an unspecified amount of time, and then retrieved Katsigiannis’ gun, went back into the house, and shot Katsigiannis and then Bologna at close range. Though defendant claims that the evidence established that he killed in the heat of passion, there was sufficient evidence presented that defendant unlawfully murdered Katsigiannis with malice.

The trial court chose to instruct the jury on second degree murder and voluntary manslaughter of Katsigiannis, which implies that the trial court found that there was sufficient evidence to convict defendant of either crime. Just because there was some evidence of heat of passion does not mean that the State failed to present sufficient evidence to establish the elements of second degree murder. Because there was evidence of heat of passion, the presumption of malice became a “permissible inference” and the trial court was thus required to instruct the jury on both crimes, which it did in this case. *Id.*

In sum, viewing the evidence in the light most favorable to the State, there was sufficient evidence to establish all elements of second degree murder. Therefore, this assignment of error is without merit.

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## V. Sufficient Evidence to Establish Murder of Bologna

[8] Defendant argues that the trial court erred in denying defendant's motion to dismiss the charge of first degree murder of Bologna on the grounds that the evidence was insufficient to establish every element of the crime. Defendant specifically asserts that the State failed to establish that defendant intentionally killed Bologna with premeditation and deliberation. The trial court instructed the jury on first degree murder and second degree murder.

"First-degree murder is the unlawful killing of another human being with malice and with premeditation and deliberation." *State v. Tirado*, 358 N.C. 551, 591, 599 S.E.2d 515, 542 (2004); N.C. Gen. Stat. § 14-17 (2007).

A killing is premeditated if "the defendant formed the specific intent to kill the victim some period of time, however short, before the actual killing." A killing is deliberate if the defendant acted "in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation."

*State v. Rios*, 169 N.C. App. 270, 280, 610 S.E.2d 764, 771 (2005) (quoting *State v. Bonney*, 329 N.C. 61, 77, 405 S.E.2d 145, 154 (1991)). "Premeditation and deliberation 'are usually proven by circumstantial evidence because they are mental processes that are not readily susceptible to proof by direct evidence.'" *State v. Mack*, 161 N.C. App. 595, 605, 589 S.E.2d 168, 175 (2003) (quoting *State v. Sierra*, 335 N.C. 753, 758, 440 S.E.2d 791, 794 (1994)).

According to Tam's testimony, defendant killed Bologna after advancing from his hide-out in a wooded area, going back into the home, and shooting Katsigiannis. Thus, the evidence showed a time lapse for reflection during which defendant decided to go back into the home armed with Katsigiannis' gun. Additionally, forensic evidence showed that Bologna was shot twice at close range, which required multiple pulls of the trigger. *Id.* (the defendant's act of shooting the victim twice at close range was circumstantial evidence of premeditation and deliberation); *State v. LaPlanche*, 349 N.C. 279, 283, 507 S.E.2d 34, 36 (1998) (the defendant's act of shooting the victim four times in the head at close range was circumstantial evidence of premeditation and deliberation).

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Based on the evidence presented at trial, we find no error in the trial court's denial of defendant's motion to dismiss the charge of first degree murder with regard to Jenna Bologna, as there was sufficient evidence, viewed in the light most favorable to the State, to establish each element of the charge.

VI. Failure to Submit the Charge of Voluntary Manslaughter of Bologna to the Jury

[9] Defendant argues that the trial court erred in refusing to instruct the jury on the charge of voluntary manslaughter with regard to Bologna. "The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The *presence of such evidence* is the determinative factor." *State v. Hicks*, 241 N.C. 156, 159, 84 S.E.2d 545, 548 (1954).

"Voluntary manslaughter is the unlawful killing of a human being without malice, express or implied, and without premeditation or deliberation. One who kills a human being while under the influence of passion or in the heat of blood produced by adequate provocation is guilty of manslaughter." *State v. Wynn*, 278 N.C. 513, 518, 180 S.E.2d 135, 139 (1971) (citations omitted).

Defendant relies on *State v. Mathis*, 105 N.C. App. 402, 413 S.E.2d 301, *disc. review denied*, 331 N.C. 289, 417 S.E.2d 259 (1992). In *Mathis*, the evidence tended to show that the defendant retreated to his truck from his home after he and his wife had an argument. *Id.* at 403, 413 S.E.2d at 302. The defendant's wife attempted to stop him from leaving by opening the car door, trying to take the keys out of the ignition, and ordering him to get out. *Id.* The defendant then tried to drive away, and in so doing, he ran over his wife, killing her. *Id.* at 404, 413 S.E.2d at 302. The defendant was convicted of voluntary manslaughter and argued on appeal that there was insufficient evidence to support a jury instruction on voluntary manslaughter. *Id.* at 406, 413 S.E.2d at 304. The Court held that in that situation, "the victim's yelling and threatening behavior would have a natural tendency to arouse the passions of an ordinary person. From these facts the jury could find the victim's provoking conduct and defendant's action were of such close proximity in time that defendant's mind and disposition did not cool." *Id.* Accordingly, "[i]nsofar as there was evidence before the court to support a conviction of voluntary manslaughter, it was proper to submit that issue to the jury." *Id.*

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*Mathis* is readily distinguishable. In the present case, there was a time lapse between the argument that took place between defendant and Bologna and the actual shootings. Defendant here was shot at, re-entered the home, shot Katsigiannis, then turned to Bologna and shot her as well. Furthermore, Tam testified that defendant shot Bologna because she was screaming after defendant shot Katsigiannis, not because of the prior altercation. Because there was no evidence that defendant killed Bologna in the heat of passion, we hold that the trial court did not err in refusing to instruct the jury on this lesser included offense.

VII. Sufficiency of the Evidence to Establish Robbery with a Dangerous Weapon

[10] Defendant argues that the trial court erred in denying defendant's motion to dismiss the charge of robbery with a dangerous weapon due to insufficiency of the evidence. Specifically, defendant contends that the evidence was insufficient to prove that the theft and the use of force were part of a continuous transaction.

[A]rmed robbery is defined as the taking of the personal property of another in his presence or from his person without his consent by endangering or threatening his life with a firearm or other deadly weapon with the taker knowing that he is not entitled to the property and the taker intending to permanently deprive the owner of the property.

*State v. Powell*, 299 N.C. 95, 102, 261 S.E.2d 114, 119 (1980); N.C. Gen. Stat. § 14-87 (2007).

To be found guilty of robbery with a dangerous weapon, the defendant's threatened use or use of a dangerous weapon must precede or be concomitant with the taking, or be so joined by time and circumstances with the taking as to be part of one continuous transaction. Where a continuous transaction occurs, the temporal order of the threat or use of a dangerous weapon and the taking is immaterial.

*State v. Olson*, 330 N.C. 557, 566, 411 S.E.2d 592, 597 (1992) (citations omitted).

Defendant asserts a strong similarity between his case and *Powell*. The evidence in *Powell* tended to show that the defendant raped and murdered the victim, then took the deceased's automobile and television. *Id.* at 100, 261 S.E.2d at 116. Our Supreme Court found:

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[T]here [was] no substantial evidence giving rise to the reasonable inference that the defendant took the objects from the victim's presence by use of a dangerous weapon, an essential element of robbery with a dangerous weapon. The arrangement of the victim's body and the physical evidence indicate she was murdered during an act of rape. We believe that even construing the evidence in a light most favorable to the State, it indicates only that defendant took the objects as an afterthought once the victim had died.

*Id.* at 102, 261 S.E.2d at 119. Here, there is substantial evidence that defendant used a deadly weapon to kill the victims and then took their property, not as a mere afterthought, but with the intent of utilizing the vehicle and cellular telephones, and selling other personal property. Furthermore, in *Powell*, the killing occurred in the same transaction as the rape, not the theft. That is not the case here.

The fact that the victims were deceased at the time of the taking is irrelevant.

To accept defendant's argument would be to say that the use of force that leaves its victim alive to be dispossessed falls under [N.C. Gen. Stat. §] 14-87, whereas the use of force that leaves him dead puts the robber beyond the statute's reach. That the victim is already dead when his possessions are taken has not previously been an impediment in this jurisdiction to the defendant's conviction for armed robbery. All that is required is that the elements of armed robbery occur under circumstances and in a timeframe that can be perceived as a single transaction.

*State v. Fields*, 315 N.C. 191, 201-02, 337 S.E.2d 518, 524-25 (1985) (citation and footnote omitted). Accordingly, we hold that the killings and the robbery occurred during one continuous transaction.

**[11]** Defendant also claims a lack of intent to permanently deprive either victim of their property; however, there was sufficient evidence to show that defendant took the automobile and other personal property out of the state with no intent of returning them.

Where the evidence does not permit the inference that defendant ever intended to return the property forcibly taken but requires the conclusion that defendant was totally indifferent as to whether the owner ever recovered the property, there is no justification for indulging the fiction that the taking was for a temporary purpose, without any *animus furandi* or *lucri causa*.

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*State v. Smith*, 268 N.C. 167, 172, 150 S.E.2d 194, 200 (1966). In sum, we find that all the elements of robbery with a firearm were met, and the trial court did not err in refusing to dismiss the charge.

## VIII. Jury Instruction Regarding Flight

**[12]** Lastly, defendant argues that the trial court erred in instructing the jury on flight because there was no evidence to support such an instruction. “So long as there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged, the instruction is properly given.” *State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977). Defendant claims that his traveling to New York was a standard practice and was not evidence of flight.

Tam’s testimony provided that defendant, Bologna, and Katsigiannis would visit her in New York approximately every other weekend. Contrary to his normal behavior, defendant went to New York alone on the trip in question, telling police that George allowed him to borrow his car and cellular telephone. Additionally, defendant arrived in New York on a Saturday, was still within the state on Tuesday, and never mentioned a date of departure. This too was an unusual pattern of behavior for defendant according to Tam’s testimony.

As provided in *Irick*, “[t]he fact that there may be other reasonable explanations for defendant’s conduct does not render the instruction improper.” *Id.* Furthermore, “evidence of flight does not create a presumption of guilt but is only some evidence of guilt which may be considered with the other facts and circumstances in the case in determining guilt.” *Id.*

Based on the evidence provided at trial, there was evidence of flight. Therefore, this assignment of error is without merit.

Conclusion

We hold that the trial court did not err by refusing to dismiss the short form indictment; denying defendant’s motion to suppress the cellular telephone records; admitting the four crime scene photographs; denying defendant’s motion to dismiss the charge of second degree murder of Katsigiannis; denying defendant’s motion to dismiss the charge of first degree murder of Bologna; denying defendant’s motion to dismiss the charge of robbery with a dangerous weapon; refusing to instruct the jury on voluntary manslaughter with regard to Bologna’s death; and instructing the jury on flight.

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No Error.

Chief Judge MARTIN and Judge BRYANT concur.

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MICHAEL KINLAW, PLAINTIFF v. JOHN J. HARRIS, JR., M.D., DEFENDANT

No. COA08-1584

(Filed 8 December 2009)

**Judgments— exempt status of IRA—withdrawn IRA funds**

The trial court erred by requiring defendant to place funds withdrawn from his IRAs in the future into escrow or other trust pending a determination by the trial court as to whether those funds remained exempt from plaintiff's judgment against defendant for \$567,000 in compensatory and punitive damages. N.C.G.S. § 1C-1601(a)(9) exempts defendant's IRAs and defendant's legal use of funds contained within those IRAs from plaintiff's judgment.

Judge ERVIN concurring in part and dissenting in part.

Appeals by Plaintiff and Defendant from order entered 21 July 2008 by Judge Gary L. Locklear in Superior Court, Robeson County. Heard in the Court of Appeals 19 August 2009.

*Anderson, Johnson, Lawrence, Butler & Bock, L.L.P., by Steven C. Lawrence, for Plaintiff.*

*McCoy Weaver Wiggins Cleveland Rose Ray, PLLC, by Jim Wade Goodman, for Defendants.*

McGEE, Judge.

The underlying judgment in this case was entered on 3 May 2004, in which Plaintiff was awarded \$567,000.00 in compensatory and punitive damages. Defendant moved to claim certain property as exempt from Plaintiff's judgment on 9 June 2004. By order entered 16 July 2004, an assistant clerk of Robeson County Superior Court ordered that Defendant's two IRA accounts and other items not relevant to this appeal were exempt property and not subject to the 3 May 2004 judgment. Upon Plaintiff's motion, a writ of execution was

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issued 28 November 2005 by another assistant clerk of Robeson County Superior Court, which directed the Sheriff of Durham County to satisfy the 3 May 2004 judgment out of Defendant's personal and/or real property located in Durham County, including Defendant's two IRAs.<sup>1</sup> In response, Defendant filed a motion on 21 November 2007 to affirm exemption and vacate the 28 November 2005 writ of execution.

By order entered 21 July 2008, the trial court affirmed the 9 June 2004 motion to claim exempt property, stating:

By virtue of the Motion to Claim Exempt Property dated June 9, 2004 . . . and the order thereon dated July 16, 2004 . . . , the Subject IRAs were and are legally exempt from execution in this action, and [Defendant], subject to the other provisions in this order, retains the Subject IRAs free of the enforcement of the claims of [Plaintiff] in this action.

The trial court further declared the writ of execution and the accompanying levy against Defendant void, and it ordered Defendant's IRAs immediately released from any restrictions "placed thereon as a result of the Writ of Execution and Notice of Levy[.]" However, the trial court further ordered in relevant part that:

Should [D]efendant make any withdrawal of any funds from the Subject IRAs, the entire amount of said withdrawal shall immediately be placed in the trust account of his counsel, [or other authorized agent], and [the funds shall be administered] in accordance with the terms herein. Defendant or [Defendant's] counsel shall immediately thereafter give [P]laintiff's counsel notice of the withdrawal by the most expedient, verifiable means. Plaintiff shall then have five (5) business days from the date of such notification to file a motion or otherwise petition the Court to determine if the withdrawal funds are no longer exempt from execution. . . . If [P]laintiff timely makes such a motion or petition, the withdrawn funds shall remain in trust or escrow pending a determination of their exempt status, or until the parties mutually agree to release of such funds.

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1. One of the retirement account numbers was listed in Defendant's motion for exemption and Defendant's motion to affirm exemption and vacate writ of execution as "Y99-254911." In the writ of execution one of the retirement account numbers was listed as "Y99-15491" and in a 19 May 2008 affidavit by Defendant, one of his retirement account numbers was listed as "Y99-154911." No argument has been made on appeal concerning the discrepancies between the account number for this retirement account, and we assume these numbers all refer to the same account. The second retirement account is listed as "Y99-037842" in all four documents.

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Both Plaintiff and Defendant appeal from the trial court's 21 July 2008 order.

## I.

Defendant's sole argument on appeal is that the trial court erred by requiring Defendant to place any funds withdrawn in the future from his IRAs into escrow or other trust pending a determination by the trial court as to whether those funds retained their exempt status. We agree.

N.C. Gen. Stat. § 1C-1601 identifies property that is exempt from claims of creditors. The version of N.C. Gen. Stat. § 1C-1601 in effect for the relevant period states:

(a) Exempt property. Each individual, resident of this State, who is a debtor is entitled to retain free of the enforcement of the claims of creditors:

. . . .

(9) Individual retirement plans as defined in the Internal Revenue Code and any plan treated in the same manner as an individual retirement plan under the Internal Revenue Code[.]

N.C. Gen. Stat. § 1C-1601(a)(9) (2005). Plaintiff admits that Defendant's IRAs are covered under the definition of exempt retirement plans as stated in N.C. Gen. Stat. § 1C-1601(a)(9). However, Plaintiff contends that N.C. Gen. Stat. § 1C-1601(a)(9) only applies to funds withdrawn after age 59  $\frac{1}{2}$ , or pursuant to certain other limited exceptions. Plaintiff argues that if Defendant withdraws funds before age 59  $\frac{1}{2}$  and incurs a penalty for the withdrawal, because no exception applies, then Plaintiff should be able to access those funds to satisfy Plaintiff's judgment against Defendant. For this reason, Plaintiff argues that the trial court acted within its power by ordering that any funds withdrawn from Defendant's IRAs be held in escrow until a determination is made by the trial court as to whether the funds were withdrawn for proper purposes—i.e., purposes which would not incur any early withdrawal penalties.

Defendant argues that, because N.C. Gen. Stat. § 1C-1601(a)(9) exempts his IRAs from Plaintiff's judgment against him, Plaintiff is not entitled to any funds currently held in Defendant's IRAs, and the trial court erred in ordering a process to make a determination concerning whether Plaintiff is entitled, pursuant to the 3 May 2004 judg-

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ment, to any potential funds Defendant withdraws from his IRAs. This issue is one of first impression in this State.

Exemption statutes are to be interpreted liberally. Accordingly, based on: (1) the enactment of legislation in 1995 to protect a debtor's retirement income from the claims of creditors; . . . and (4) the policy that exemption statutes are to be interpreted liberally, the Court concludes that the North Carolina General Assembly's purpose in enacting N.C. Gen. Stat. § 1C-1601(a)(9) was to protect a debtor's right to receive retirement benefits[.] Rather than give a blanket exemption to all "retirement" plans, the General Assembly limited the exemption to any retirement tool that was "treated in the same manner as an individual retirement plan under the Internal Revenue Code." In so doing, the General Assembly prohibited debtors from labeling an ordinary savings account as an individual retirement plan and thereby shielding that asset from the reach of creditors under the charade that the exemption statute applied.

*In re Grubbs*, 325 B.R. 151, 154-55 (Bankr. M.D.N.C. 2005) (internal citation omitted); *see also Elmwood v. Elmwood*, 295 N.C. 168, 185, 244 S.E.2d 668, 678 (1978); *In re Laughinghouse*, 44 B.R. 789, 791 (Bankr. E.D.N.C. 1984) ("The courts have held that the exemption laws in North Carolina must be liberally construed in favor of the debtor."), *Abrogated on different issue by In re Pinner*, 146 B.R. 659 (Bankr. E.D.N.C. Oct 26, 1992).

## II.

In *Rousey v. Jacoway*, 544 U.S. 320, 161 L. Ed. 2d 563 (2005), the United States Supreme Court reasoned:

The statutes governing IRAs persuade us that [the petitioners'] right to payment from IRAs is causally connected to their age. Their right to receive payment of the entire balance is not in dispute. Because their accounts qualify as IRAs under 26 U.S.C. § 408(a) (2000 ed. and Supp. II) [26 USCS § 408(a)], the [petitioners] have a nonforfeitable right to the balance held in those accounts, § 408(a)(4). That right is restricted by a 10-percent tax penalty that applies to withdrawals from IRAs made before the accountholder turns 59 ½. Contrary to [the respondent's] contention, this tax penalty is substantial. The deterrent to early withdrawal it creates suggests that Congress designed it to preclude early access to IRAs. The low rates of early withdrawals are consistent with the notion that this penalty substantially deters

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early withdrawals from such accounts. Because the 10-percent penalty applies proportionally to any amounts withdrawn, it prevents access to the 10-percent that the [petitioners] would forfeit should they withdraw early, and thus it effectively prevents access to the entire balance in their IRAs. It therefore limits the [petitioners'] right to "payment" of the balance of their IRAs. And because this condition is removed when the accountholder turns age 59 ½, the [petitioners'] right to the balance of their IRAs is a right to payment "on account of" age. The [petitioners] no more have an unrestricted right to payment of the balance in their IRAs than a contracting party has an unrestricted right to breach a contract simply because the price of doing so is the payment of damages.

*Rousey*, 544 U.S. at 327-28, 161 L. Ed. 2d at 571-72 (footnotes omitted). Following the reasoning of *Rousey*, we hold that Defendant's right to withdraw funds from his IRAs is not "unrestricted," and thus his IRAs are not analogous to checking accounts or other non-restricted accounts. *Grubbs*, 325 B.R. at 155.

The statute pertaining to exemptions from judgments, N.C. Gen. Stat. § 1C-1601(a)(9), references the Internal Revenue Code only as it pertains to the definition of retirement plans: "Individual retirement plans as defined in the Internal Revenue Code and any plan treated in the same manner as an individual retirement plan under the Internal Revenue Code[.]" There is no dispute that Defendant's IRAs fall within this definition. N.C. Gen. Stat. § 1C-1601(a)(9) does not indicate that any other provisions of federal law may be consulted in determining whether Defendant's IRAs, or the funds contained within, are exempt from Plaintiff's judgment. Defendant argues that only North Carolina law should apply. Plaintiff does not answer Defendant's argument on this point. We hold that, because N.C. Gen. Stat. § 1C-1601(a)(9) only references the Internal Revenue Code to clarify what retirement accounts are covered by the creditor exemption, North Carolina law governs the resolution of this issue. See *In re Coppola*, 419 F.3d 323, 329 (5th Cir. Tex. 2005); *In re Rayl*, 299 B.R. 465, 467 (Bankr. S.D. Ohio 2003).

Because this is an issue of first impression, however, we look for guidance to decisions from other jurisdictions. In *In re Brucher*, 243 F.3d 242, 243 (6th Cir. Mich. 2001), the plaintiff argued that the defendant's IRA could be exempt from creditors "if and only if payment thereunder is made 'solely . . . "on account of illness, disability, death, age or length of service." ' ' ' The Sixth Circuit disagreed, stating:

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This reading, in our view, suffers from at least two flaws. In the first place, § 522(d)(10)(E) does not contain the word “solely”; it merely provides that the payment must be made “on account of” age. Like pensions, IRAs are structured to provide maximum payments upon the participant’s reaching a certain age. The fact that early withdrawal might be available—subject, in the case of IRAs, to a 10 percent penalty for withdrawals made before the beneficiary has attained the age of 59  $\frac{1}{2}$ , *see* 26 U.S.C. § 72(t)(1)—is irrelevant, as the statute does not require that the payment be made “solely” on account of age.

*Brucher*, 243 F.3d 242, 243-44; *see also Clark v. Lindquist*, 683 N.W.2d 784, 787 (Minn. 2004) (“[I]t seems to us that our legislature clearly intended that IRAs generally be exempt by expressly listing them, in contrast to 11 U.S.C. § 522(d)(10)(E), which does not mention them by name. Furthermore, the debtor’s access to the funds is not completely unfettered.”); *Rayl*, 299 B.R. at 467 (“Section 2329.66(A)(10)(c) of the Ohio Revised Code specifically refers to individual retirement accounts, individual retirement annuities, Roth IRA’s and education IRA’s. Unlike the Michigan statute at issue in [*Lampkins v. Golden*, 28 Fed. Appx. 409 (6th Cir. Jan. 17, 2002)], it does not reference the whole of § 408 of the Internal Revenue Code. Furthermore, the Ohio statute exempts [rollover IRA’s] only to the extent that the contributions are less than or equal to . . . the applicable limits imposed by federal statutes.”).

We note that even where a statute makes specific reference to payments made from IRAs, appellate courts have tended to refer to IRAs in general, and not specifically to withdrawal of funds from IRAs, even when the withdrawal of funds was in issue.

The parties have not argued, so we do not decide, that there is a difference between exempting the right to receive payment from an IRA versus exempting the IRA itself. The Supreme Court does not appear to perceive any difference of significance. Compare *Rousey*, 544 U.S. at 325 (“the right to receive payment may be exempted”), with *id.* at 326 (“IRAs can be exempted”). Hence, we, too, will assume the semantic interchangeability and refer to exempting both in this opinion.

*In re Krebs*, 527 F.3d 82, 85 n.3 (3d Cir. Pa. 2008). *See also Brucher*, 243 F.3d at 243-44; *Clark*, 683 N.W.2d at 787; *In re Rayl*, 299 B.R. at 467.

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Statutes from certain other jurisdictions include express limitations on the exemption from creditors enjoyed by retirement funds. *See e.g.*, 11 U.S.C. § 522(d)(10)(E); Ga. Code Ann. § 44-13-100(2)(f); Minn. Stat. § 550.37(24)(a); Ohio Rev. Code Ann. § 2329.66(A)(10)(b). N.C. Gen. Stat. § 1C-1601(a)(9) contains no such restrictions. Plaintiff's reliance on *Krebs* for the proposition that the trial court acted correctly in reserving the right to determine whether Defendant's withdrawals are for proper purposes is misplaced, as the relevant statute in *Krebs*, 11 U.S.C. § 522(d)(10)(E), includes express restrictions not included in N.C. Gen. Stat. § 1C-1601(a)(9).

We find the reasoning in the cases cited above persuasive. N.C. Gen. Stat. § 1C-1601(a)(9) does not contain any language evincing an intent on the part of the General Assembly to treat withdrawals from IRAs differently than funds held within IRAs, and we are not prepared to infer any such intent. The plain language of N.C. Gen. Stat. § 1C-1601(a)(9) states that IRAs are exempt from judgment. The most straightforward and logical reading of N.C. Gen. Stat. § 1C-1601(a)(9) is that not only are the IRAs themselves exempt, but Defendant's legal use of the IRAs, in the same manner as if there were no judgment against Defendant, is also exempt. *See Krebs*, 527 F.3d at 85 n.3; *Brucher*, 243 F.3d at 243-44.

Logically and practically this interpretation is the most sensible. As stated in *Rousey*, any early withdrawals not covered by the limited exemptions made by Defendant from his IRAs will incur serious financial penalties. *Rousey*, 544 U.S. at 327-28, 161 L. Ed. 2d at 571-72. This is Defendant's choice to make, however. Though early withdrawals from Defendant's IRAs may subject Defendant to serious financial penalties and prevent him from realizing the full financial benefit of the protected status of his IRAs, early withdrawals from IRAs are not illegal and do not constitute improper use of those IRAs.

While we understand the dissent's concern that the protections afforded by N.C. Gen. Stat. § 1C-1601(a)(9) could allow an IRA account holder to withdraw IRA monies for purposes unrelated to retirement or other penalty-free exceptions, it is the province of the General Assembly, not this Court, to craft legislation. The dissent correctly states that there is no express exception in N.C. Gen. Stat. § 1C-1601(a)(9) providing an exemption from creditors for monies withdrawn from an IRA prior to the account holder reaching the age of 59 ½, or for any of the other penalty-free exemptions provided for by the IRS. In support of its argument, the dissent cites *Sara Lee*

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*Corp. v. Carter*, 351 N.C. 27, 519 S.E.2d 308 (1999), stating that “[g]enerally speaking” (emphasis added),

where the legislature has made no exception to the positive terms of the statute, the presumption is that it intended to make none, and it is a general rule of construction that the courts have no authority to create, and will not create, exceptions to the provisions of a statute not made by the act itself.

*Id.* at 36, 519 S.E.2d at 313. Although we agree that the rule of statutory construction cited in *Sara Lee* is an appropriate rule of construction in certain circumstances, there are many rules of statutory construction, and not every rule will be appropriate in any given case. We believe this rule is inappropriate on the facts before us, as the ultimate result of its use could lead to results we believe were not intended by the General Assembly.

If we were to find this particular rule of construction controlling in the case before us, we would be constrained to hold that *no* funds are ever fully protected from execution once they are withdrawn from an IRA. This would include funds withdrawn after the age of 59 ½, penalty-free and for the purposes of support in retirement, because the language of N.C. Gen. Stat. § 1C-1601(a)(9) contains no exception for funds withdrawn after the IRA account holder reaches the age of 59 ½ (“Individual retirement plans as defined in the Internal Revenue Code and any plan treated in the same manner as an individual retirement plan under the Internal Revenue Code [are exempt from the claims of creditors.]”). Even Plaintiff does not construe N.C. Gen. Stat. § 1C-1601(a)(9) in this manner. As the General Assembly has not included language in N.C. Gen. Stat. § 1C-1601(a)(9) excluding the use of *any* IRA funds from the creditor exemption, we cannot usurp the role of the General Assembly and decide that some uses of withdrawn IRA funds will not be exempt, while other uses will be.

As we previously stated, it is not illegal, or on its face unethical, to withdraw IRA funds early for any reason. Early withdrawal of funds, when not covered by one of the exceptions created by the United States Congress is, however, discouraged by the substantial early withdrawal penalty.

We therefore hold, liberally construing the statute in favor of Defendant, *Elmwood*, 295 N.C. at 185, 244 S.E.2d at 678; *Laughinghouse*, 44 B.R. at 791, that N.C. Gen. Stat. § 1C-1601(a)(9) exempts Defendant’s IRAs and Defendant’s legal use of funds con-

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tained within those IRAs, from Plaintiff's judgment. As the issue is not before us, we do not make any holding regarding any question concerning contributions Defendant may have made, or may in the future make, to his IRAs.

## III.

We therefore vacate that portion of the trial court's 21 July 2008 order requiring Defendant to place in escrow any funds he may withdraw from his IRAs to await decision by the trial court as to whether the funds are subject to Plaintiff's judgment. We affirm the remainder of the trial court's 21 July 2008 order. Our holding in Defendant's appeal has also decided Plaintiff's appeal of the trial court's order. We therefore do not address Plaintiff's appeal.

Affirmed in part, vacated in part.

Judge JACKSON concurs.

Judge ERVIN concurs in part and dissents in part with a separate opinion.

ERVIN, Judge, concurring in part and dissenting in part.

Although I concur in the remainder of the Court's decision, including its determination that N.C. Gen. Stat. § 1C-1601(a)(9) renders funds contained in Defendant's individual retirement accounts exempt from execution despite the fact that Defendant had withdrawn monies from those accounts on two prior occasions, I respectfully dissent from the Court's decision to vacate that portion of the trial court's order that requires Defendant to notify Plaintiff of any withdrawal from his individual retirement accounts and allows Plaintiff five business days "to file a motion or otherwise petition the Court to determine if the withdrawn funds are no longer exempt from execution." As a result, I concur in the Court's opinion in part and dissent in part.

Both parties and the Court agree that the extent to which Defendant's individual retirement accounts can be utilized to satisfy the judgment that Plaintiff obtained against Defendant hinges upon the proper interpretation of N.C. Gen. Stat. § 1C-1601(a)(9). As applied to judgments entered before 1 January 2006, N.C. Gen. Stat. 1C-1601(a)(9) provided that:

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(a) Exempt property. Each individual, resident of this State, who is a debtor is entitled to retain free of the enforcement of the claims of creditors:

. . . .

- (9) Individual retirement plans as defined in the Internal Revenue Code and any plan treated in the same manner as an individual retirement plan under the Internal Revenue Code. For purposes of this subdivision, “Internal Revenue Code” means Code as defined in G.S. 105-228.90.

“The courts have held that the exemption laws in North Carolina must be liberally construed in favor of the debtor.” *In re Laughinghouse*, 44 B.R. 789, 791 (Bankr. E.D.N.C. 1984) (citing *In re Love*, 42 B.R. 317 (Bankr. E.D.N.C. 1984)); *see also Elmwood v. Elmwood*, 295 N.C. 168, 185, 244 S.E.2d 668, 678 (1978) (stating that exemptions “should always receive a liberal construction, so as to embrace all persons fairly coming within their scope”) (quoting *Goodwin v. Claytor*, 137 N.C. 224, 236, 49 S.E. 173, 177 (1904)). In seeking to subject the funds contained in Defendant’s individual retirement accounts to execution, Plaintiff argues that Defendant structured his court-approved equitable distribution settlement with his former spouse so as to transfer any of their marital assets that might have been subject to execution to his former wife; that the only significant assets that Defendant retained were the individual retirement accounts at issue here; and that, as evidenced by two withdrawals made in 2004 and 2005, Defendant used these individual retirement accounts as private savings vehicles rather than to provide for his retirement. Aside from the fact that two withdrawals over a four year period does not, at least in my opinion, establish the validity of Plaintiff’s factual argument, Plaintiff has cited no authority demonstrating that N.C. Gen. Stat. § 1C-1601(a)(9) is subject to an exception of the nature for which he contends, and I have not discovered any in the course of my own work. Generally speaking, “where the legislature has made no exception to the positive terms of the statute, the presumption is that it intended to make none, and it is a general rule of construction that the courts have no authority to create, and will not create, exceptions to the provisions of a statute not made by the act itself.” *Sara Lee Corp. v. Carter*, 351 N.C. 27, 36, 519 S.E.2d 308, 313 (1999) (quoting *Upchurch v. Hudson Funeral Home, Inc.*, 263 N.C. 560, 565, 140 S.E.2d 17, 21

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(1965)).<sup>2</sup> As a result, given the plain language of N.C. Gen. Stat. § 1C-1601(a)(9), given the fact that the accounts at issue are clearly individual retirement accounts as defined in N.C. Gen. Stat. § 1C-1601(a)(9), and given the absence of any justification for reading the relevant statutory language to mean something other than what it says, I agree with the majority's affirmation of the trial court's decision to "vacate[] and declare[] to be null and void" "[t]he Writ of Execution in this matter dated" 28 November 2005 and to "vacate[] and declare[] to be null and void" "[t]he 'Notice of Levy' dated" 9 December 2005.

I cannot, however, agree with the remainder of the Court's decision, which vacates that portion of the trial court's order providing:

4. Should defendant make any withdrawal of any funds from the Subject IRAs, the entire amount of said withdrawal shall immediately be placed in the trust account of his counsel, or placed with a suitable escrow agent who shall be provided with a copy of this order, and shall administer the funds in accordance with the terms herein. Defendant or his counsel shall immediately thereafter give plaintiff's counsel notice of the withdrawal by the most expedient, verifiable means. Plaintiff shall then have five (5) business days from the date of such notification to file a motion or otherwise petition the Court to determine if the withdrawn funds are no longer exempt from execution. Should the plaintiff fail to make such a motion or petition within such time, the withdrawn funds shall be paid over to defendant, free from execution and levy by plaintiff. If plaintiff timely makes such a motion or petition, the withdrawn funds shall remain in trust or escrow pending a determination of their exempt status, or until the parties mutually agree to release of such funds. The parties shall endeavor and cooperate so as to have the Court determine the status of

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2. The Court contends that my reference to the principle of statutory construction enunciated in *Sara Lee* "is inappropriate on the facts before us, as the ultimate result of its use could lead to results we believe were not intended by the General Assembly." A careful reading of this dissent indicates, however, that I have cited *Sara Lee* in support of my conclusion that the trial court correctly rejected Plaintiff's contention that N.C. Gen. Stat. § 1C-1601(a)(9) should be construed to allow the corpus of individual retirement accounts to be subject to execution in the event that the account owner makes early withdrawals and not in support of my conclusion that the notification provision of the trial court's order should be upheld on appeal. I do not believe that the Court disagrees with the position in connection with which I have cited *Sara Lee*.

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the withdrawn funds as expeditiously as possible after any motion or petition seeking such a determination is filed.

In challenging the notification provision, Defendant concedes that the specific issue that he raises on appeal has not been directly addressed by the Supreme Court or by this Court. For that reason, he relies primarily on certain fundamental principles that he believes to be pertinent. First, Defendant emphasizes that exemptions from execution “should always receive a liberal construction,” *Elmwood*, 295 N.C. at 185, 244 S.E.2d at 678, and that “provisions which restrict a debtor’s access to his exemptions should be construed narrowly,” so that debtors have “a great deal of flexibility in claiming and maintaining their exemptions.” *Household Fin. Corp. v. Ellis*, 107 N.C. App. 262, 266, 419 S.E.2d 592, 595 (1992), *aff’d*, 333 N.C. 785, 429 S.E.2d 716 (1993). Secondly, Defendant points to the basic principle of statutory construction that, “where a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded.” *Union v. Branch Banking & Trust Co.*, 176 N.C. App. 711, 717, 627 S.E.2d 276, 279 (2006) (quoting *Mazda Motors of Am., Inc. v. SW. Motors, Inc.*, 296 N.C. 357, 361, 250 S.E.2d 250, 253 (1979)). In reliance upon these premises, Defendant argues that “an interpretation of N.C. [Gen. Stat. §] 1C-1601(a)(9) which exempts funds while physically in an IRA account, but immediately strips the funds of their exempt status once withdrawn by the debtor for whose benefit[] the exemption was enacted, is in fact absurd, as it renders the exemption meaningless and useless[.]” According to Defendant, “[a] more reasonable interpretation that avoids such an absurd result, gives effect to the legislative purpose of the exemption, and is more consistent with the principle of liberal construction for the protection of the debtor, is that it is the funds themselves that are exempt . . . , a status that doesn’t change merely due to the funds being ‘poured’ from the IRA.” As a result, Defendant’s challenge to the notification provision rests exclusively on the contention that all funds ever contained within an individual retirement account are exempt from execution by virtue of N.C. Gen. Stat. § 1C-1601(a)(9) regardless of the purpose for which those funds are eventually used.<sup>3</sup>

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3. In view of his failure to challenge the notification provision using any legal theory other than the one discussed in the text, Defendant has foregone the opportunity to contest the validity of the notification provision on any other basis. See *Citifinancial Mortgage Co. v. Gray*, 187 N.C. App. 82, 93, 652 S.E.2d 321, 327 (2007) (stating that, “[a]s defendant has not cited any authority in support of this argument, it is deemed abandoned and we do not address it”).

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The essential issue before the Court is one of statutory construction. “The principal goal of statutory construction is to accomplish the legislative intent.” *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (citing *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297, 507 S.E.2d 284, 290 (1998)). “The best indicia of that intent are the language of the statute . . . , the spirit of the act and what the act seeks to accomplish.” *Coastal Ready-Mix Concrete Co. v. Bd. of Commr’s*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980). As a result, in construing N.C. Gen. Stat. § 1C-1601(a)(9), we should focus our efforts on attempting to ascertain the protections that the General Assembly intended to provide by exempting individual retirement accounts from execution.

In holding that the trial court erred by including the notification provision in its order, the Court essentially accepts Plaintiff’s reasoning. The Court begins its analysis by reasoning that, given the logic of *Rousey v. Jacoway*, 544 U.S. 320, 327-28, 161 L. Ed. 2d 563, 571-72 (2005), Defendant’s “IRAs are not analogous to checking accounts or other non-restricted accounts.” In addition, the Court concludes that, given the absence of any indication that “any other provisions of federal law may be consulted in determining whether Defendant’s IRAs, or the funds contained within, are exempt from Plaintiff’s judgment,” “North Carolina law governs the resolution of this issue.” I agree with both of these conclusions. After noting during a discussion of authority from other jurisdictions that, “even where a statute makes specific reference to payments made from IRAs, appellate courts have tended to refer to IRAs in general, and not specifically to withdrawal of funds from IRAs, even when the withdrawal of funds was in issue,” and that N.C. Gen. Stat. § 1C-1601(a)(9) “does not contain any language evincing an intent on the part of the General Assembly to treat withdrawals from IRAs differently than funds held within IRAs,” the Court concludes that “[t]he most straightforward and logical reading of N.C. Gen. Stat. § 1C-1601(a)(9) is that not only are the IRAs exempt, but Defendant’s legal use of the IRAs in the same manner as if there were no judgment against Defendant, is also exempt.” Based on this logic, the Court decides that the trial court erred by including the notification provision in its order. I do not find this logic sufficient to justify vacating the notification provision for a number of reasons.

First, the Court’s decision does not effectuate the policies that underlie the exemption created by N.C. Gen. Stat. § 1C-1601(a)(9). The “General Assembly’s purpose in enacting N.C. Gen. Stat. § 1C-1601(a)(9) was to protect a debtor’s right to receive retirement benefits[.]” *In re Grubbs*, 325 B.R. 151, 154-55 (Bankr. M.D.N.C. 2005)

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(emphasis added). This understanding of the legislative intent underlying N.C. Gen. Stat. § 1C-1601(a)(9) is fully consistent with the fundamental purpose of individual retirement accounts themselves, which is “to provide retirement benefits to individuals.” *In re Brucher*, 243 F.3d 242, 243 (6th Cir. 2001). As a result, I believe that the General Assembly’s intent in enacting N.C. Gen. Stat. § 1C-1601(a)(9) was to protect the ability of individual retirement account owners to provide themselves with retirement benefits. Since the Court concludes that all funds that have been paid out from Defendant’s individual retirement account are protected from execution by N.C. Gen. Stat. § 1C-1601(a)(9) regardless of the extent to which those funds are used to “provide retirement benefits,” the construction of N.C. Gen. Stat. § 1C-1601(a)(9) adopted by the Court is not consistent with the legislative intent that motivated the enactment of the relevant statutory provision, a fact that casts doubt on the validity of the construction adopted by the Court.

Secondly, the effect of the Court’s decision is to insulate any money that ever enters Defendant’s individual retirement accounts from the claims of his creditors, no matter what use Defendant may make of those funds. For example, assume for purposes of discussion that Defendant withdraws a substantial sum from one or both of his individual retirement accounts in order to purchase a luxury motor vehicle, a yacht, or a vacation home. Under the Court’s construction of N.C. Gen. Stat. § 1C-1601(a)(9), the mere fact that the money utilized to purchase these assets passed through Defendant’s individual retirement accounts suffices to preclude Plaintiff from executing on these items of property even though they have little or nothing to do with ensuring that Defendant’s retirement needs are met. As has already been noted, “ ‘where a literal interpretation of the language of a statute will . . . contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded.’ ” *Frye Reg’l Med. Ctr., Inc. v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999) (quoting *Mazda Motors*, 296 N.C. at 361, 250 S.E.2d at 253 (internal quotation omitted)). An interpretation of N.C. Gen. Stat. § 1C-1601(a)(9) that allows Defendant to use monies that were once contained in his individual retirement accounts in this manner without any risk that the resulting purchases will be subject to execution seems to me to run afoul of this fundamental canon of statutory construction. The fact that Defendant has not and may not make such an inappropriate use of the monies contained in his individual retirement accounts should not obscure the fact that, under the interpreta-

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tion of N.C. Gen. Stat. § 1C-1601(a)(9) adopted by the Court, he has the ability to do so with impunity. As a result, I believe that we should eschew the construction of N.C. Gen. Stat. § 1C-1601(a)(9) adopted by the Court for this reason as well.<sup>4</sup>

Thirdly, I am unable to agree with the full extent of the Court's reasoning, based upon decisions such as *In re Krebs*, 527 F.3d 82 (3rd Cir. 2008), and *In re Brucher*, 243 F.3d 242 (6th Cir. 2001), to the effect that providing protection for the corpus of an individual retirement account necessarily involves protecting disbursements from the account as well. Although I do not dispute that these decisions, and others upon which the Court also relies, hold that disbursements from individual retirement accounts, in addition to corpus of the account, are protected under various statutory exemption and exception provisions,<sup>5</sup> I am not certain that acceptance of this proposition should end our inquiry. Like my colleagues, I agree that a certain measure of protection should be provided to disbursements made from individual retirement accounts. In addition, I join my colleagues in believing that the exemption from execution created by N.C. Gen. Stat. § 1C-1601(a)(9) would mean little in the event that Defendant could not access the funds in his individual retirement account in order to provide retirement benefits to himself and for other appropriate purposes.<sup>6</sup> However, the Court appears to believe that the

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4. After acknowledging my "concern that the protections afforded by N.C. Gen. Stat. § 1C-1601(a)(9) could allow an [individual retirement account] holder to withdraw IRA monies for purposes unrelated to retirement or other penalty-free exceptions," the Court notes that "it is the province of the General Assembly and not this Court, to craft legislation." I fully agree that the ultimate policy decisions concerning the extent to which disbursements from individual retirement accounts should be subject to the claims of creditors is a matter which is subject to control by the General Assembly; however, for the reasons stated in the text, I do not believe that the General Assembly intended to permanently immunize all funds that ever pass through individual retirement accounts from the claims of creditors regardless of the use that the account holder makes of those funds. For that reason, I believe that the interpretation of N.C. Gen. Stat. § 1C-1601(a)(9) that I have advanced is more consistent with the intent of the General Assembly than that adopted by the Court, which simply assumes, instead of demonstrating, that the General Assembly intended to countenance the results that I have described in the text.

5. As an aside, I note that certain of the statutory provisions at issue in the cases upon which the Court relies, such as 11 U.S.C. § 522(d)(10)(E), provide explicit protection to payments made from individual retirement accounts.

6. To be clear, by "other appropriate purposes," I mean purposes which are exempt from the claims of creditors under North Carolina law, are exempt from withdrawal penalties pursuant to the provisions of federal law governing individual retirement accounts, are used to provide support during retirement, or are otherwise protected under federal law.

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General Assembly intended to protect any and all disbursements from individual retirement accounts from execution, regardless of the purpose for which those disbursements are made, by enacting N.C. Gen. Stat. § 1C-1601(a)(9), while I do not believe that the General Assembly intended to provide such payments with this sort of ironclad protection. The Court's conclusion to this effect appears to rest upon the unstated premise that either all disbursements from an individual retirement account are exempt from execution under N.C. Gen. Stat. § 1C-1601(a)(9) or that none of them are, which leads to the unstated conclusion that since some such disbursements should be exempt, all of them must be. I am unwilling to go that far, because I believe, for the reasons stated in more detail above, that such a construction of N.C. Gen. Stat. § 1C-1601(a)(9) is inconsistent with the fundamental purpose "of provid[ing] retirement benefits for individuals" and leads to results that are unlikely to be reflective of the General Assembly's intent. Instead, I believe that the applicable canons of construction support a more nuanced interpretation of N.C. Gen. Stat. § 1C-1601(a)(9), under which some disbursements from an individual retirement account remain subject to the protections of N.C. Gen. Stat. § 1C-1601(a)(9) and some do not.<sup>7</sup> Since the

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7. The Court appears to think that, under the interpretation of N.C. Gen. Stat. § 1C-1601(a)(9) that I believe to be appropriate, "no funds are fully protected from execution once they are withdrawn from an" individual retirement account, including "funds withdrawn after the age of 59 ½, penalty-free and for the purposes of support in retirement, because the language of N.C. Gen. Stat. § 1C-1601(a)(9) contains no exception for funds withdrawn after the IRA account holder reaches the age of 59 ½." The Court misapprehends my position in two respects. First, as I explained in more detail in Footnote No. 1, I have not cited *Sara Lee*, 351 N.C. 27, 519 S.E.2d 308, in discussing the lawfulness of the notification provision and have not taken the position that the lack of reference to disbursements in the literal language of N.C. Gen. Stat. § 1C-1601(a)(9) means that the relevant statutory language provides no protection for payments from individual retirement accounts. Secondly, contrary to the Court's assertion, I have not taken the position that no disbursement from an individual retirement account is entitled to absolute protection from the claims of creditors. Instead, as is discussed in some detail in the text, I believe that certain disbursements from an individual retirement account, such as funds withdrawn after the age of 59 ½ for purposes of support during retirement, are protected from the claims of the account holders' creditors by N.C. Gen. Stat. § 1C-1601(a)(9). To be absolutely clear, where I differ from the Court is that I do not believe that **all** disbursements from an individual retirement account, regardless of the purpose for which the resulting payments are used, are permanently immunized from the claims of the account holder's creditors by N.C. Gen. Stat. § 1C-1601(a)(9). I believe that this construction of N.C. Gen. Stat. § 1C-1601(a)(9), and not that espoused by the Court, is consistent with the General Assembly's intent, since it is focused upon the reasons that led the General Assembly to exempt individual retirement accounts from execution and since I do not, for the reasons stated above, believe that the General Assembly intended to permit individual retirement account owners to purchase luxury vehicles, yachts, or vacation homes using monies derived from their individual retirement accounts while the valid claims of creditors remain unsatisfied.

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construction of N.C. Gen. Stat. § 1C-1601(a)(9) adopted by the Court does not incorporate such a nuanced approach and since I do not believe that the decisions upon which the Court relies are inconsistent with the construction of N.C. Gen. Stat. § 1C-1601(a)(9) that I believe to be appropriate or compel the result reached by the Court, I am not persuaded that these decisions from other jurisdictions adequately support the result reached by the Court.<sup>8</sup>

Finally, I do not believe that an interpretation of N.C. Gen. Stat. § 1C-1601(a)(9) that exempts some, but not all, disbursements from an individual retirement account from execution runs afoul of the general principle that statutory exemptions should be “liberally construed.” After all, the literal language of N.C. Gen. Stat. § 1C-1601(a)(9) only mentions the corpus of an individual retirement account, so that extending the protection of the statutory exemption to disbursements involves a liberal construction of the exemption in and of itself. Furthermore, the rule favoring “liberal constructions” does not, it seems to me, override the other factors that must be considered in construing statutory provisions, such as attempting to effectuate the legislative intent and avoid results that manifestly run counter to the likely intent of the General Assembly. Any construction of N.C. Gen. Stat. § 1C-1601(a)(9) more “liberal” than the one set forth in this dissent strikes me as inconsistent with the intent of the General Assembly. As a result, I believe that the approach I have described is fully consistent with the general rule favoring the “liberal construction” of statutory exemptions.

At bottom, it seems to me that the approach adopted by the trial court reflects a proper understanding of the scope of the exemption set out in N.C. Gen. Stat. § 1C-1601(a)(9). In essence, the trial court concluded that some disbursements from Defendant’s individual retirement accounts should be protected from execution and that others should not. To the extent that Defendant seeks to use monies from his individual retirement accounts for support during retirement, other purposes for which penalty-free withdrawals can be made under the provisions of federal law governing individual retire-

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8. Although the Court cites *Brucher*, 243 F.3d 242, as rejecting the proposition that “the defendant’s IRA could be exempt from creditors ‘if and only if payment thereunder is made solely . . . on account of illness, disability, death, age or length of service,’” I do not believe that it conflicts with the result that I believe to be appropriate here since (1) the Sixth Circuit’s actual holding was that the corpus of the debtor’s individual retirement account was not subject to inclusion in his bankruptcy estate, and since (2) nothing in the Sixth Circuit’s opinion suggests that any property that the debtor purchased using money derived from his individual retirement account was permanently protected from the claims of his creditors (internal quotations omitted).

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ment accounts, or purposes which would be exempt from execution under other provisions of state or federal law, those monies should remain protected from execution, and the interpretation of N.C. Gen. Stat. § 1C-1601(a)(9) that I believe to be appropriate would do just that. To the extent that Defendant seeks to use monies from his individual retirement accounts in ways which are not consistent with the purposes sought to be accomplished by N.C. Gen. Stat. § 1C-1601(a)(9), such monies should not be protected from the claims of creditors. Since the only way to ascertain which disbursements are entitled to protection under N.C. Gen. Stat. § 1C-1601(a)(9) and which are not is to examine each disbursement on a case-by-case basis, the trial court set up a mechanism under which such an analysis could be conducted in an expedited manner. Given that Defendant has challenged the notification provision exclusively on the grounds that no monies that had ever passed through his individual retirement accounts could be subject to the claims of his creditors, I do not believe that we need to evaluate the extent to which the trial court had the authority to require the use of the particular approach mandated by its order. Thus, given that the trial court's order rests upon a proper understanding of the scope of the exemption set out in N.C. Gen. Stat. § 1C-1601(a)(9) and given that Defendant has not challenged the actual mechanism developed by the trial court for the purpose of evaluating withdrawals by Defendant from his individual retirement accounts, I do not see any basis for concluding that the notification provision suffers from any legal defect based upon the arguments advanced in Defendant's brief.

As a result, for the reasons stated above, I believe that the trial court correctly granted Defendant's motion to vacate the writ of execution that Plaintiff had procured. In addition, I do not believe that the only argument that Defendant has advanced in opposition to the notification provision in the trial court's order has any merit. Thus, I would affirm the trial court's order in its entirety. For that reason, I concur in that portion of the Court's opinion that affirms the trial court's decision to vacate the writ of execution and declares the notice of levy to be null and void, and dissent from that portion of the Court's opinion that vacates the notification provision in the trial court's order.

**CUNNINGHAM v. SELMAN**

[201 N.C. App. 270 (2009)]

J. CALVIN CUNNINGHAM, PLAINTIFF v. ROSEMARY BLEVINS SELMAN, DEFENDANT

No. COA09-199

(Filed 8 December 2009)

**1. Jurisdiction— subject matter—North Carolina State Bar’s fee dispute resolution program**

The trial court did not err in dismissing for lack of subject matter jurisdiction plaintiff’s civil action to recover unpaid attorney fees from Defendant. The State Bar’s fee dispute resolution rules are jurisdictional and mandatory; the basic principle that one must comply with a valid administrative scheme before seeking redress in the courts is applicable. In this case, mediation of the fee dispute was still pending because the State Bar mediator had not declared an impasse and no written settlement agreement had been executed by the parties.

**2. Jurisdiction— subject matter—North Carolina State Bar’s fee dispute resolution program—conclusion**

The undisputed evidence in this case shows that plaintiff prematurely and unilaterally ended his participation in the State Bar’s fee dispute resolution program and brought suit against defendant, a decision which will not be countenanced.

**3. Jurisdiction— subject matter—North Carolina State Bar’s fee dispute resolution program—waiver of rules**

By terminating the fee dispute resolution process and notifying the Grievance Committee of plaintiff’s conduct, the State Bar did not “waive” its fee dispute resolution rules, thereby allowing plaintiff’s civil action to move forward, as this would render meaningless the State Bar’s rules and any resulting jurisdictional limitations on the power of the courts to hear and decide such cases.

**4. Jurisdiction— subject matter—North Carolina State Bar’s fee dispute resolution program**

In an action filed to recover attorney fees for plaintiff’s representation of defendant in an equitable distribution litigation, plaintiff’s reliance on *Baars v. Campbell University* and Comment [7] of Rule 0.2 of the Rules of Professional Conduct was misplaced as defendant did not seek to hold plaintiff liable for an alleged violation of the Rules but, instead, attempted to use plaintiff’s noncompliance with the State Bar’s rules as a jurisdictional defense to plaintiff’s claim.

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**5. Jurisdiction— subject matter—order to dismiss**

The trial court dismissed plaintiff's complaint seeking recovery of attorney fees for his representation of defendant in an equitable distribution litigation because plaintiff's failure to comply with the State Bar's fee dispute resolution rules deprived the trial court of jurisdiction over the subject matter of plaintiff's complaint. The trial court's dismissal of plaintiff's complaint was not a sanction for plaintiff's violation of the State Bar's fee dispute resolution rules and plaintiff will not have been sanctioned twice for the same conduct if the State Bar ultimately imposes sanctions.

Appeal by Plaintiff from order entered 30 October 2008 by Judge Richard W. Stone in Davidson County Superior Court. Heard in the Court of Appeals 2 September 2009.

*Law Offices of J. Calvin Cunningham, by Harvey W. Barbee, Jr., and Cheshire Parker Schneider Bryan & Vitale, by Jonathan McGirt, for Plaintiff.*

*Barry Snyder, for Defendant.*

ERVIN, Judge.

J. Calvin Cunningham (Plaintiff) appeals from order entered 30 October 2008 dismissing his complaint and the counterclaims of Rosemary Selman (Defendant) without prejudice. After careful consideration of the record in light of the applicable law, we affirm the trial court's decision.

Plaintiff is an attorney at law licensed to practice in North Carolina. Defendant retained Plaintiff to represent her in a number of domestic relations matters. As part of that process, Defendant executed three contracts in which she retained Plaintiff's services, one of which provided for Plaintiff's representation of Defendant in connection with claims for divorce from bed and board, child custody, child support, alimony, and attorneys' fees, with attorneys' fees to be billed at hourly rates of \$200.00 per hour for Plaintiff and \$175 per hour for Nicholas Wilson, an associate employed by Plaintiff; a second of which provided for Defendant's representation of Plaintiff in a claim for equitable distribution of marital property, with Plaintiff to receive a contingent fee consisting of 40% of any recovery obtained in that litigation; and the third of which provided for Plaintiff's representation of Defendant in connection with claims involving a request for a

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domestic violence protective order and civil assault, with attorneys' fees apparently to be charged in the same manner and at the same rate as provided for in the first contract. The present dispute relates solely to Plaintiff's claim for fees owed in connection with his representation of Defendant in the equitable distribution matter.

During the period from 3 February 2006 to 4 March 2008, Defendant paid Plaintiff \$62,971.91 relating to legal work performed in connection with the first (and, possibly, the third) contract. In addition, Defendant paid \$8,481.61 associated with the recovery of \$21,204.03 and \$55,303.00 associated with the recovery of \$132,575.00 in the equitable distribution case. Thus, Defendant paid Plaintiff a total of \$126,756.52 for legal work performed on her behalf prior to the point at which the present controversy erupted.

In 2007, Plaintiff negotiated a final settlement on Defendant's behalf in the equitable distribution proceeding, under which Defendant received an additional \$443,149.59. Under the contingent fee contract between the parties relating to the equitable distribution matter, Plaintiff contends that Defendant owes an additional \$177,259.84 in legal fees, plus \$1,337.71 in unreimbursed expenses and interest at the legal rate. As a result of Defendant's refusal to pay this additional amount, a dispute over the amount of unpaid legal fees arose between the parties.

According to Rule 1.5(f) of the Rules of Professional Conduct:

Any lawyer having a dispute with a client regarding a fee for legal services must:

- (1) make reasonable efforts to advise his or her client of the existence of the North Carolina State Bar's program of fee dispute resolution at least 30 days prior to initiating legal proceedings to collect the disputed fee; and
- (2) participate in good faith in the fee dispute process if the client submits a proper request.

In addition, 27 NCAC 01D.0706(a) states, in pertinent part, that:

The attorney must allow at least 30 days after the client shall have received written notice of the fee dispute resolution program before filing a lawsuit. An attorney may file a lawsuit prior to expiration of the required 30-day notice period or after the petition is filed by the client if such is necessary to preserve a claim. However, the attorney must not take any further steps to pursue

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the litigation until he/she complies with the fee dispute resolution rules. Clients may request fee dispute resolution at any time prior to the filing of a lawsuit. No filing fee shall be required. The request should state with clarity and brevity the facts of the fee dispute and the names and addresses of the parties. It should also state that, prior to requesting fee dispute resolution, the matter has not been adjudicated, and the matter is not presently the subject of litigation. All requests for resolution of a disputed fee must be filed before the statute of limitations has run or within three years of the ending of the attorney/client relationship, whichever comes last.

Plaintiff appears to have properly notified Defendant of her right to participate in the fee dispute resolution process, and Defendant appears to have submitted a proper request for resolution of the parties' fee dispute to the State Bar. As a result, the State Bar's fee resolution procedures appear to have been properly commenced and, up to a point, have proceeded in the customary manner. Unfortunately, however, the process "jumped the tracks" in the late spring and early summer of 2008.

On 14 April 2008, Krista Bathurst, the State Bar mediator assigned to the dispute between the parties, sent an e-mail to Plaintiff indicating that Defendant could "pay the reduced ED" "within 15 days" and asking two questions: (1) "how much of the February 13, 2008 bill is being credited back to the client per previous emails[,] and (2) was this amount "the only balance due your office at this time, the ED?"<sup>1</sup> On 23 May 2008, Plaintiff faxed Ms. Bathurst a letter to which "a photocopy of the invoice mailed to [Defendant] on February 5, 2008, showing a courtesy discounted balance due of \$144,000.00[,] was attached. According to Plaintiff's letter, "[t]he settlement figure of \$443,149.59 divided by the \$144,000.00 balance equals .3249%." On 27 May 2008, Ms. Bathurst e-mailed the following response to Plaintiff:

I [have received] your fax with the ED percentage and balance previously offered and agreed to by your firm, to wit, the sum of \$144,000. Please let me know if you are still willing to accept this reduced balance and I will let the client know immediately and get back with you. If this is accepted, I trust this resolves the ED balance. You did indicate you would be waiving the interest charged on this balance with your firm.

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1. Ms. Bathurst's e-mail also contains an unclear reference to an "additional \$40.00 billed by the paralegal to the ED matter."

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On 30 June 2008, Plaintiff filed a complaint in Davidson County Superior Court seeking to recover \$178,597.51 in fees and expenses, plus interest on this principal amount from and after 24 January 2008 accruing at eight percent per annum, or \$1,181.73 per month, from Defendant based on his representation of Defendant in the equitable distribution matter. In his complaint, Plaintiff alleged, among other things, that, “[p]ursuant to the State Bar guidelines, Plaintiff and Defendant attempted fee dispute resolution but reached an impasse.” Plaintiff’s complaint was served upon Defendant by hand delivery on 1 July 2008.

On 2 July 2008, Ms. Bathurst sent Plaintiff a letter, a copy of which she also provided to Defendant, in which she indicated that she had received a call from Defendant to the effect that Plaintiff had “filed suit against her to collect the disputed fee and that she was served with same by the” Sheriff. Ms. Bathurst further stated that:

As previously stated in my May 2, 2008 email, you are precluded from filing suit against Ms. Selman until this mediation is resolved and I have completed my investigation of the same. This has not occurred. To date, I have been unable to complete my investigation due to your non-compliance and refusal to provide me with the documentation I have repeatedly requested. . . .

Presently, this mediation is open and being investigated. By filing suit against [Defendant], it would be my understanding that you are in violation of the Rules of Professional Conduct.

On 3 July 2008, Ms. Bathurst sent Defendant a letter, a copy of which she also mailed to Plaintiff, in which she stated that:

The rules that govern the State Bar’s Fee Dispute Resolution Program mandate that an attorney must participate in the fee dispute resolution process once fees have been disputed by the client. Should the attorney fail to participate in the fee dispute resolution process, the policy of the program is to refer the matter to the State Bar’s Grievance Department for appropriate action.

In your case, the attorney has failed to participate in good faith in the fee dispute resolution process. Pursuant to our last telephone conversation, this is to advise you that no further action is being taken on your request for fee dispute resolution. Accordingly, the file has been closed.

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We have, however, initiated a grievance file regarding your fee dispute with [Plaintiff]. If you wish to be listed as a party to the grievance process, please contact Dawn Whaley of the Grievance Department. The closing of the fee dispute file does not preclude you and [Plaintiff] from voluntarily settling the dispute or both parties from pursuing whatever legal remedies may be available.

On 29 July 2008, Plaintiff sent Defendant's counsel the following letter, in which he attempted to explain the basis upon which he believed that he was entitled to initiate litigation against Defendant:

This dispute was referred to Fee Dispute Resolution with the North Carolina State Bar. On May 22, 2008, in a telephone conversation with [Ms. Bathurst], she told me that she advised [Defendant] that the forty percent (40%) contingency fee was appropriate for this type of case and for this area. Ms. Bathurst and I then came to an agreement to compromise the contingency fee, the expenses and the interest due by law on contracts ([N.C. Gen. Stat. §] 24-1). After our conversation, a letter misstating the settlement agreement came from the Bar's Ms. Bathurst indicating that "I trust this resolves the ED balance." After this, it was our understanding that there was no further dispute or investigation with this contract for compensation in the equitable distribution case and filed suit.

The purpose of this letter is to inform that I am still open to a compromise.

On 29 August 2008, Defendant filed Answer and Counterclaims in which she denied the material allegations of Plaintiff's complaint; asserted a number of affirmative defenses, including a claim that "Plaintiff's suit for recovery of fees in representing Defendant is barred by Plaintiff's conduct in failing to cooperate with the directives of the North Carolina State Bar and the Rules of Professional Conduct;" and counterclaimed for a more exact statement of the legal services for which she was being billed and a credit or offset to eliminate any charges "for the time involved in making the bill and sending a copy of it to" her. On 2 September 2008, Defendant filed an Amended Answer in which she restated two of her affirmative defenses.

On 16 September 2008, Plaintiff served a notice to take Defendant's deposition, which was scheduled to occur on 2 October 2008. On 29 September 2008, Plaintiff filed a Reply To Counterclaims,

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Motion To Dismiss, Motion To Strike and Motion For Sanctions in which Plaintiff requested the Court to dismiss Defendant's counterclaim and impose sanctions upon Defendant for asserting affirmative defenses which Plaintiff contended were interposed for an improper purpose and were not well-grounded in fact. On 30 September 2008, Defendant filed a Motion To Dismiss, Motion To Stay Proceeding, Motion For Protective Order [And] Precluding Further Discovery in which Defendant requested the Court "to dismiss Plaintiff's lawsuit, or in the alternative[,] stay these proceedings," on the grounds that "Plaintiff's suit for recovery of fees in representing Defendant is barred by Plaintiff's conduct in failing to cooperate with the directives of the North Carolina State Bar and the Rules of Professional Conduct." On 14 October 2008, Defendant filed a Motion For Judgment On The Pleadings and Summary Judgment and Response To Plaintiff's Motions, Motion For Leave Of Court To Amend Answer and Counterclaim, to which were attached supporting affidavits by Defendant and John W. Lunsford.

On 30 October 2008, the trial court entered an Order providing that:

This matter came on for hearing pursuant to the defendant's motion to dismiss the complaint on the grounds it was filed in violation of 27 N.C.A.C. 1D. Upon review of the file, evidence and argument of counsel, the court finds as fact as follows:

The plaintiff and the defendant, as attorney and client, are in a dispute over attorney fees charged by the plaintiff.

The dispute was referred to the NC State Bar Attorney/Client Assistance Program for dispute resolution.

Prior to the completion of the dispute resolution procedure provided for by the NC State Bar[,] the plaintiff filed this action. Based on the foregoing Findings of Fact, the court makes the following Conclusions of Law:

27 N.C.A.C. 1D.0700 gives the NC State Bar jurisdiction over disagreements concerning fees and expenses between attorneys and clients.

Pursuant to 27 N.C.A.C. 1D.0706 an attorney may not file a lawsuit once the State Bar has assumed jurisdiction, except as may be necessary to preserve a claim, until such time as the attorney has complied with provisions of the fee dispute resolution rules.

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Compliance with the NC State Bar rules necessarily implies allowing the Attorney/Client Assistance Program time to complete its investigation and recommend dismissal, complete a mediation, and announce an impasse or entry of an agreement.

The plaintiff has not complied with provisions of the fee dispute resolution rules in that at the time of filing the lawsuit the matter was still pending before the NC State Bar Attorney/Client Assistance Program.

Based on the foregoing, it is hereby Ordered that the complaint filed in this matter is dismissed without prejudice.

It is further Ordered, based upon representations of counsel for the defendant on the record, that the counterclaims are hereby dismissed without prejudice.

Plaintiff noted an appeal to this Court from the trial court's order on 6 November 2008.

Legal Analysis

On appeal, Plaintiff essentially advances two issues for our consideration: (1) whether an attorney involved in mediating a fee dispute under the auspices of the State Bar's fee dispute resolution program may concurrently bring a civil action in Superior Court against his former client for the purpose of seeking the recovery of unpaid fees, and (2) whether such an action may go forward, even if filed before the fee dispute resolution process has concluded, in the event that the State Bar closes its file on the fee dispute following the filing of that action. We conclude that the answer to both questions is in the negative and, therefore, affirm the order of the trial court dismissing Plaintiff's complaint without prejudice for lack of subject matter jurisdiction.

**[1]** Even the most casual perusal of the record demonstrates that Plaintiff and Defendant have a dispute over the appropriateness of the fee that Plaintiff has charged Defendant for his services in the equitable distribution matter in which Defendant was involved. As we have already noted, Rule 1.5(f) of the Rules of Professional Conduct requires attorneys involved in fee disputes with a client to provide notice of the State Bar's fee dispute resolution process to that client and to participate in good faith in that process in the event that the client requests the State Bar's assistance in resolving the dispute. According to the Comments to Rule 1.5(f):

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[10] Participation in the fee dispute resolution program of the North Carolina State Bar is *mandatory* when a client requests resolution of a disputed fee. Before filing an action to collect a disputed fee, the client must be advised of the fee dispute resolution program. Notification must occur not only when there is a specific issue in dispute, but also when the client simply fails to pay. . . . (emphasis added)

[11] If a fee dispute resolution is requested by a client, the lawyer *must participate* in the resolution process in good faith. The State Bar program of fee dispute resolution uses mediation to resolve fee disputes as an alternative to litigation. The lawyer must cooperate with the person who is charged with investigating the dispute and with the person(s) appointed to mediate the dispute. . . . (emphasis added)

[12] A lawyer may petition a tribunal for a legal fee if allowed by applicable law or, *subject to the requirements for fee dispute resolution set forth in Rule 1.5(f)*, may bring an action against a client to collect a fee. The tribunal's determination of the merit of the petition or the claim is reached by an application of law to fact and not by the application of this Rule. Therefore, a tribunal's reduction or denial of a petition or claim for a fee is not evidence that the fee request violates this Rule and is not admissible in a disciplinary proceeding brought under this Rule. (emphasis added)

Furthermore, 27 NCAC 01D.0702 provides that:

The [Attorney Client Assistance Committee] *shall have jurisdiction* over all disagreements concerning the fees and expenses charged or incurred for legal services provided by an attorney licensed to practice law in North Carolina arising out of a client-lawyer relationship. Jurisdiction shall also extend to any person, other than the client, who pays the fee of such an attorney. The committee shall not have jurisdiction over the following:

- (1) disputes concerning fees or expenses established by a court, federal or state administrative agency, or federal or state official;
- (2) disputes involving services that are the subject of a pending grievance complaint alleging the violation of the Revised Rules of Professional Conduct;
- (3) fee disputes that are or were the subject of litigation;

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- (4) fee disputes between lawyers and service providers, such as court reporters and expert witnesses;
- (5) fee disputes between lawyers and individuals with whom the lawyer had no client-lawyer relationship, except in those cases where the fee has been paid by a person other than the client; and
- (6) disputes concerning fees charged for ancillary services provided by the lawyer not involving the practice of law.

Since none of the exceptions set out in 27 NCAC 01D.0702 applied to the present fee dispute as of the time that Plaintiff filed his complaint<sup>2</sup>, the State Bar had jurisdiction over the fee dispute between Plaintiff and Defendant under the fee dispute resolution rules. In addition, as we have already noted, 27 NCAC 01D.0706 required Plaintiff to (1) notify Defendant of the availability of the State Bar's fee dispute resolution program; (2) refrain from initiating litigation against Defendant for thirty days after providing notice of the availability of the fee dispute resolution program in order to allow her to submit a proper request to participate in the program, unless filing suit before the expiration of thirty days was "necessary to preserve a claim"<sup>3</sup>; and (3) to participate in the fee dispute resolution program in *good faith* until its conclusion prior to initiating litigation. The dispute resolution process may end in one of two ways. If the dispute cannot be resolved, pursuant to 27 NCAC 1D.0707(c)(7), the mediator must "determine and declare that an impasse exists" and that the mediation will end. If the dispute is resolved, the parties' agreement must be "reduced to writing and signed by all parties." 27 NCAD 1D.0708. Because Ms. Bathurst had not declared impasse and no written agreement had been executed, the fee dispute resolution process was still pending. In this instance, while Plaintiff did apparently notify Defendant of the existence of the fee dispute resolution pro-

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2. At one point, Plaintiff appears to contend that he is entitled to the benefit of the exception for claims in litigation set out in 27 NCAC 01D.0702(3). However, Plaintiff's argument is without merit, since the "litigation" exception only applies to fee disputes that had entered litigation before the State Bar's jurisdiction attached to the dispute, such as would occur in cases where the client failed to request the assistance of the fee dispute resolution program within 30 days after receiving the notice required by 27 NCAC 01D.0706.

3. For example, the statute of limitations on the attorneys' fee claim might be about to expire, or the attorney might have information that the client would attempt to evade lawsuit by fleeing the country. In this case, Plaintiff has not claimed that filing suit was necessary to preserve his claim against Defendant, rendering this exception to the general prohibition against the filing of civil actions during the course of the fee dispute resolution process inapplicable.

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gram, and while Plaintiff did apparently engage in some negotiations about the amount of his fee through Ms. Bathurst, he did not wait until Ms. Bathurst declared the fee dispute resolution process at an end before filing suit against Defendant. As a result, at the time that Plaintiff filed suit against Defendant, the State Bar was still attempting to resolve Plaintiff's fee dispute with Defendant.

N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) provides, in pertinent part, that:

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

. . . .

Lack of jurisdiction over the subject matter[.]

The absence of subject matter jurisdiction affects the court's statutory or constitutional power to adjudicate a claim and is an issue that can be raised at any stage of a proceeding. N.C. Gen. Stat. § 1A-1, Rule 12(h)(3). "[U]nlike a Rule 12(b)(6) dismissal, the court need not confine its evaluation [of a Rule 12(b)(1) motion] to the face of the pleadings, but may review or accept any evidence, such as affidavits, or it may hold an evidentiary hearing." *Smith v. Privette*, 128 N.C. App. 490, 493, 495 S.E.2d 395, 397 (1998).

Unlike a Rule 12(b)(6) motion, consideration of matters outside the pleadings does not convert the Rule 12(b)(1) motion to one for summary judgment . . . . An appellate court's review of an order of the trial court denying or allowing a Rule 12(b)(1) motion is *de novo*, except to the extent the trial court resolves issues of fact, and those findings are binding on the appellate court if supported by competent evidence in the record.

*Privette*, 128 N.C. App. at 493, 495 S.E.2d at 397 (quotations omitted). Although the trial court did make findings of fact in the course of deciding the issues raised by Defendant's dismissal motion, Plaintiff has not challenged the sufficiency of the record evidence to support those findings. As a result, the only issue before us on appeal is the correctness of the trial court's conclusion that the trial court did, in fact, lack subject matter jurisdiction over Plaintiff's claim against Defendant, an issue which we review on a *de novo* basis. *Id.*

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“Jurisdiction of the court over the subject matter of an action is the most critical aspect of the court’s authority to act. Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question.” *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987). “Subject matter jurisdiction is conferred upon the courts by either the North Carolina Constitution or by statute.” *Pembaur*, 84 N.C. App. at 667, 353 S.E.2d at 675. The civil jurisdiction of the Superior Court Division of the General Court of Justice is specified in N.C. Gen. Stat. § 7A-240, which provides that:

Except for the original jurisdiction in respect of claims against the State which is vested in the Supreme Court, original general jurisdiction of all justiciable matters of a civil nature cognizable in the General Court of Justice is vested in the aggregate in the superior court division and the district court division as the trial divisions of the General Court of Justice. Except in respect of proceedings in probate and the administration of decedents’ estates, the original civil jurisdiction so vested in the trial divisions is vested concurrently in each division.

N.C. Gen. Stat. § 7A-240. “[E]xcept for areas specifically placing jurisdiction elsewhere (such as claims under the Workers’ Compensation Act) the trial courts of North Carolina have subject matter jurisdiction over ‘all justiciable matters of a civil nature.’” *Pembaur*, 84 N.C. App. at 668, 353 S.E.2d at 675. As a result, the Superior Court would, ordinarily, have jurisdiction over civil actions brought by attorneys against clients seeking judgments for amounts owed as attorneys’ fees.

The State Bar is “an agency of the State of North Carolina,” N.C. Gen. Stat. § 84-15, that was created “to enable the bar to render more effective service in improving the administration of justice, particularly in dealing with the problem of admission to the bar, and of disciplining and disbarring attorneys at law.” *Baker v. Varser*, 240 N.C. 260, 267, 82 S.E.2d 90, 95-96 (1954). “The government of the North Carolina State Bar is vested in a council of the North Carolina State Bar referred to . . . as the ‘Council.’” N.C. Gen. Stat. § 84-17.

The Council is vested . . . with the authority to regulate the professional conduct of licensed lawyers and State Bar certified paralegals. Among other powers, the Council shall administer this Article; take actions that are necessary to ensure the competence of lawyers and State Bar certified paralegals; *formulate and adopt rules of professional ethics and conduct*; investigate

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and prosecute matters of professional misconduct; grant or deny petitions for reinstatement; resolve questions pertaining to membership status; *arbitrate disputes concerning legal fees*, certify legal specialists and paralegals and charge fees to applicants and participants necessary to administer these certification programs; determine whether a member is disabled; maintain an annual registry of interstate and international law firms doing business in this State; and formulate and adopt procedures for accomplishing these purposes. The Council may do all things necessary in the furtherance of the purposes of this Article that are not otherwise prohibited by law.

N.C. Gen. Stat. § 84-23(a) (emphasis added). The State Bar, pursuant to its authority to “formulate and adopt rules of professional ethics and conduct” and to “arbitrate disputes concerning legal fees,” clearly had the authority to adopt rules requiring members of the legal profession to participate in good faith in a fee dispute resolution program as a precondition for initiating litigation against clients for the purpose of attempting to collect unpaid legal fees; Plaintiff does not appear to contend otherwise. The literal language of 27 NCAC 01D.0702, which provides that “[t]he committee *shall have jurisdiction* over all disagreements concerning the fees and expenses charged or incurred for legal services provided by an attorney licensed to practice law in North Carolina arising out of a client-lawyer relationship,” speaks in jurisdictional terms and vests jurisdiction over a fee dispute between an attorney and his or her client with the State Bar’s fee dispute resolution program until such time as the efforts made by that program to resolve the dispute come to a natural conclusion. Then, and only then, does a trial court have subject matter jurisdiction to hear a suit filed by an attorney seeking to reduce a claim for attorneys’ fees against a client to judgment. For that reason, we conclude that the State Bar’s fee dispute resolution rules are jurisdictional in nature and that Plaintiff was obligated to comply with those rules as a prerequisite for bringing a civil suit against Defendant for the purpose of collecting a fee owed for the provision of legal services in the absence of compelling reason for reaching a contrary conclusion.

One might argue that the dual system of attorney discipline that exists in North Carolina constitutes an obstacle to the conclusion that compliance with the State Bar’s fee dispute resolution program is a jurisdictional prerequisite to the successful maintenance of an action for attorneys’ fees in the General Court of Justice. “North

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Carolina is different from many other jurisdictions in that there is a dual mechanism for the regulation and discipline of attorneys practicing in the state courts." *Swenson v. Thibaut*, 39 N.C. App. 77, 109, 250 S.E.2d 279, 299 (1978), *appeal dismissed and disc. review denied*, 296 N.C. 740, 254 S.E.2d 182 (1979). "The North Carolina State Bar, having established a Code of Professional Responsibility to which its members are required to conform as a condition precedent to the continuing practice of law in North Carolina, is empowered by statute [N.C. Gen. Stat. § 84-28] to discipline attorneys and regulate their conduct." *Id.* "Another statute in the same chapter, [N.C. Gen. Stat. § 84-36], however, saves and protects the inherent powers of the court to regulate and discipline attorneys practicing before it." *Id.*

This power of the court is an inherent one because it is an essential one for the court to possess in order for it to protect itself from fraud and impropriety and to serve the ends of the administration of justice which are, fundamentally, the *raison d'être* for the existence and operation of the courts. *See*, *Inherent Powers of the Court*, National College of the State Judiciary (Reno, Nevada: 1973). This inherent power is co-equal and co-extensive with the statutory grant of powers to the North Carolina State Bar, and, while the interests of the two entities having disciplinary jurisdiction may, and often do, overlap, they are not always identical and as the interests sought to be protected by the court's inherent power are distinct from those of the North Carolina State Bar, the action of a court in disciplining or disqualifying an attorney practicing before it is not in derogation or to the exclusion of similar action by the Bar. It is to be noted that steps are being taken to link more closely the disciplinary functions of the Bar and the courts. However, it is clear that the court's inherent power is not limited or bound by the technical precepts contained in the Code of Professional Responsibility as administered by the Bar.

*Thibaut*, 39 N.C. App. at 109, 250 S.E.2d at 300. As a result, at least with respect to disciplinary or disbarment proceedings, the State Bar and the trial courts of this state share concurrent jurisdiction. *North Carolina State Bar v. Randolph*, 325 N.C. 699, 701, 386 S.E.2d 185, 186 (1989).

It is true that . . . questions relating to the propriety and ethics of an attorney are ordinarily for the consideration of the North Carolina State Bar. . . . [N.C. Gen. Stat. §] 84-36 specifically provides, however, that the provisions of [Chapter 84 of the

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North Carolina General Statutes] are not to be construed as disabling or abridging the inherent powers of a court to deal with its attorneys.

*In re Northwestern Bonding Co., Inc.*, 16 N.C. App. 272, 275, 192 S.E.2d 33, 35, *cert. denied and appeal dismissed*, 282 N.C. 426, 192 S.E.2d 837 (1972) (citations omitted). Thus, under the system of concurrent jurisdiction over attorney conduct and discipline in effect in North Carolina, both the State Bar and the courts have an important role to play in assuring that attorneys conduct themselves properly, with the courts focusing on “protect[ing] [them]sel[ves] from fraud and impropriety and [] serv[ing] the ends of the administration of justice[,]” *Thibaut*, 39 N.C. App. at 109, 250 S.E.2d at 300, while the State Bar has responsibility for the broad range of “questions relating to the propriety and ethics of an attorney[,]” *In re Northwestern Bonding Co., Inc.*, 16 N.C. App. at 275, 192 S.E.2d at 35, and with neither to act in such a manner as to “disabl[e] or abridg[e]” the powers of the other. *Id.*

The trial court’s decision to prevent Plaintiff from maintaining a civil action against Defendant for the ostensible purpose of collecting a fee for his representation of Defendant in the equitable distribution litigation despite the fact that the State Bar’s fee dispute resolution process had not come to a natural conclusion does not impermissibly “disable or abridge” the courts’ inherent authority over attorney conduct. This case does not involve issues of attorney discipline or the protection of the courts from fraud or impropriety which lie at the core of the courts’ inherent authority over attorneys. In fact, prior to the point in time at which Plaintiff filed suit, nothing about the manner in which the fee dispute between Plaintiff and Defendant had been handled provided any basis for believing that Plaintiff should be subject to professional discipline. On the contrary, Comment [12] of Rule 1.5(f) of the Rules of Professional Conduct states that, as long as the attorney has participated in the required fee dispute resolution process, “a tribunal’s reduction or denial of a petition or claim for a fee is not evidence that the fee request violates this Rule[.]” In fact, the more pertinent question in this instance is not whether the State Bar’s assertion of jurisdiction over fee disputes between attorneys and their clients “disabl[es] or abridg[es] the inherent powers of a court[,]” but rather, whether the exercise of the court’s jurisdiction would “disabl[e] or abridg[e]” the functions of the State Bar. *In re Northwestern Bonding Co.*, 16 N.C. App. at 275, 192 S.E.2d at 35; *see also McMichael v. Proctor*, 243 N.C. 479, 485, 91 S.E.2d 231, 235

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(1956) (stating that, “[w]hile the court has the inherent power to act whenever it is made to appear that the conduct of counsel in a cause pending in court is improper or unethical, under our present statute[,] questions of propriety and ethics are ordinarily for the consideration of the [State Bar], which is now vested with jurisdiction over such matters”). Thus, at a minimum, we do not believe that requiring Plaintiff to comply with the State Bar’s fee dispute resolution process as a precondition to initiating civil litigation against Defendant in any way interferes with the inherent disciplinary jurisdiction of the courts over attorney conduct.

“[A] system of administrative procedure has been instituted in which matters of regulation and control may, and *must* be, tried by properly established commissions and agencies that are peculiarly qualified for the purpose.” *Elmore v. Lanier*, 270 N.C. 674, 677, 155 S.E.2d 114, 116 (1967) (emphasis added). “Thus, we have the [Industrial] Commission, the Utilities Commission, and the Insurance Commission which are similarly empowered to hear and determine controversies in their respective fields.” *Id.* “After the hearings before the agencies have been conducted, the statute[s] [provide] any aggrieved party his ‘day in court’ by appeal or other recognized procedure.” *Id.* “To permit the interruption and cessation of proceedings before a commission by untimely and premature intervention by the courts would completely destroy the efficiency, effectiveness, and purpose of the administrative agencies.” *Id.* Although the procedures adopted by the State Bar for the resolution of fee disputes between attorneys and their clients differ from the administrative procedures traditionally employed by agencies such as the Utilities Commission and the Industrial Commission, the basic principle that one must comply with a valid administrative regime before seeking redress in the courts is equally applicable in this instance. *State ex rel. Utilities Commission v. Carolina Water Service, Inc., of North Carolina*, 335 N.C. 493, 499, 439 S.E.2d 127, 130 (1994) (stating that “we have held that ‘[o]nly those who have exhausted their administrative remedy can seek the benefit of the statute [authorizing judicial review]’”) (quoting *Sinodis v. Board of Alcoholic Control*, 258 N.C. 282, 287, 128 S.E.2d 587, 590 (1962)).

**[2]** In this case, the State Bar has, by means of a set of rules and regulations the validity of which have not been challenged in this proceeding, required attorneys engaged in fee disputes with clients to participate in a State Bar-operated dispute resolution process in good faith before seeking resort to the Courts. According to the undisputed

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evidence in the record, which is reflected in the trial court's findings of fact, Plaintiff prematurely and unilaterally ended his participation in the State Bar's fee dispute resolution program and brought suit against Plaintiff for the purpose of reducing his claim to judgment.<sup>4</sup> To allow Plaintiff to violate valid State Bar rules to his own advantage by permitting his lawsuit to proceed despite his noncompliance with those rules and regulations would completely undercut "the efficiency, effectiveness, and purpose" of the State Bar's rules and "disable and abridge" its authority over attorney conduct in contravention of the dual system of jurisdiction over attorney conduct that exists in North Carolina. The law should not, and does not, countenance this result.

[3] As a related matter, Plaintiff also contends that, even if he did violate the State Bar's fee dispute resolution rules at the time that he filed his complaint, the State Bar "waived" those rules and allowed his civil action to go forward by terminating the fee dispute resolution process and notifying the Grievance Committee of his conduct upon receiving word of the filing of his complaint. Once again, we do not find this argument persuasive. In the event that an attorney could circumvent otherwise existing jurisdictional limitation on his or her ability to maintain an civil action intended to reduce a claim against a client for attorneys' fees to judgment arising from the fee dispute resolution process by simply filing suit in violation of applicable State Bar rules, the effect would be to render the State Bar's rules and any resulting jurisdictional limitations on the power of the courts to hear and decide such disputes completely meaningless. Although we express no opinion as to whether Plaintiff could have successfully advanced this "waiver" argument had he voluntarily dismissed his initial civil action and filed another one after giving the State Bar and Defendant a reasonable opportunity to restart the fee dispute resolution process, we conclude that no such "waiver" argument has any validity on the present set of facts. Thus, Plaintiff's "waiver" argument is without merit.

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4. Although Plaintiff contends that the State Bar fee dispute resolution process had ended in an impasse by the time that he filed suit against Defendant, the correspondence which Ms. Bathurst sent to both Plaintiff and Defendant tells an entirely different story. As of the date upon which Plaintiff filed his complaint against Defendant, he had received no indication from Ms. Bathurst or anyone else associated with the fee dispute resolution program that the State Bar had terminated its efforts to bring about an amicable resolution to the dispute between the parties. In the absence of such evidence, we do not believe that Plaintiff can credibly claim that he was entitled to resort to litigation because the State Bar's dispute resolution process had ended unsuccessfully.

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[4] In addition, Plaintiff contends that Defendant impermissibly used Rule 1.5(f) of the Rules of Professional Conduct as a “procedural weapon” to defeat his claim for attorneys’ fees in this case. In support of this argument, Plaintiff cites *Baars v. Campbell University*, 148 N.C. App. 408, 558 S.E.2d 871, *disc. review denied*, 355 N.C. 490, 563 S.E.2d 563 (2002), and Comment [7] of Rule 0.2 of the Rules of Professional Conduct for the proposition that Defendant lacked “standing” to raise the issue of “Plaintiff’s alleged noncompliance with the North Carolina Rules of Professional Conduct.” According to Comment [7] of Rule 0.2:

Violation of a Rule should not give rise itself to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer’s self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a Rule.

Rules of Professional Conduct, Rule 0.2, Comment [7]; *see also Baars*, 148 N.C. App. at 421, 558 S.E.2d at 879 (stating that “[t]his Court has held that ‘a breach of a provision of the Code of Professional Responsibility is not in and of itself . . . a basis for civil liability’”) (quoting *Webster v. Powell*, 98 N.C. App. 432, 439, 391 S.E.2d 204, 208 (1990), *aff’d* 328 N.C. 88, 399, S.E.2d 113 (1991)). Plaintiff’s reliance on *Baars* and Comment [7] is misplaced. The fact that the Rules are “not designed to be a basis for civil liability[;]” that the “purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons[;]” and that “nothing in the Rules should be deemed to augment any substantive legal duty of lawyers” does not mean that the Rules of Professional Conduct have utterly no bearing on the proper resolution of civil litigation. Instead, we believe Comment [7] and the principle enunciated in *Baars* are

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directed primarily toward cases in which a former client claims that an attorney is civilly liable, based, in whole or in part, on alleged violations of the Rules of Professional Conduct. The present case does not involve such a scenario. Furthermore, neither Comment [7] nor *Baars* categorically precludes the use of standards set out in the Rules of Professional Conduct in civil litigation; instead, they simply point out that the Rules of Professional Conduct do not have the primary purpose of establishing a standard of care for use in determining civil liability. In this case, however, the principle upon which Plaintiff relies is totally inapplicable because Defendant does not seek to hold Plaintiff liable for an alleged violation of Rule 1.5(f); instead, Defendant found herself on the receiving end of civil litigation after having invoked the State Bar's fee dispute resolution process and attempted to use Plaintiff's noncompliance with the State Bar's rules as a jurisdictional defense to Plaintiff's claim. At bottom, the principal question here is not whether Defendant had "standing" to inform the Court about Plaintiff's violation of Rule 1.5(f); instead, the principal issue before the trial court was whether it had subject matter jurisdiction over the issues raised by Plaintiff's complaint given Plaintiff's noncompliance with the State Bar's fee dispute resolution process, a fact about which Defendant was fully entitled to inform the trial court. As a result, Plaintiff's reliance on *Baars* and Comment [7] is misplaced.

[5] Finally, Plaintiff argues that the State Bar, and not the courts, should impose any sanction to which he is subjected as a result of any violation of the State Bar's fee dispute resolution rules that he might have committed. In advancing this argument, Plaintiff fundamentally misapprehends the nature and purpose of the trial court's ruling. The trial court did not dismiss Plaintiff's complaint as a sanction against Plaintiff; instead, the trial court dismissed Plaintiff's complaint because his failure to comply with the State Bar's fee dispute resolution rules deprived the trial court of jurisdiction over the subject matter of Plaintiff's claim against Defendant. Thus, even if the State Bar ultimately decides to sanction Plaintiff for initiating civil litigation against Defendant in order to reduce his fee claim to judgment prior to the termination of the fee dispute resolution process, he will not have been sanctioned twice for the same conduct. Thus, Plaintiff's "sanctions" argument lacks merit as well.

As a result, for the foregoing reasons, we conclude that the trial court's findings of fact are supported by competent evidence of record and that the trial court did not err by dismissing Plaintiff's

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claim without prejudice for lack of subject matter jurisdiction. At the time Plaintiff filed suit, jurisdiction over the fee dispute between Plaintiff and Defendant was vested with the State Bar, a fact which deprived the trial court of jurisdiction to hear Plaintiff's claims until the fee dispute resolution process had come to its natural conclusion. Since that event had not occurred by the time that Plaintiff filed suit against Defendant, the trial court lacked subject matter jurisdiction over Plaintiff's complaint. As a result, the trial court's order is affirmed.

AFFIRMED.

Judges GEER and STROUD concur.

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KAREN STEINKRAUSE, PETITIONER v. GEORGE TATUM, COMMISSIONER, NORTH  
CAROLINA DIVISION OF MOTOR VEHICLES, RESPONDENT

No. COA08-1080

(Filed 8 December 2009)

**1. Motor Vehicles— driving while impaired—probable cause—  
totality of circumstances**

The trial court did not err in a driving while impaired case by concluding as a matter of law that probable cause existed for petitioner's arrest based on the nature of petitioner's single car accident and the smell of alcohol.

**2. Motor Vehicles— driving while impaired—sufficiency of  
findings of fact and conclusions of law—willful refusal to  
submit to breath test**

The trial court did not err in a driving while impaired case by its findings of fact and conclusions of law with respect to petitioner's willful refusal to submit to a breath test. Even though petitioner claimed that physical injuries not apparent to the chemical analyst made cooperation impossible, petitioner failed to follow the officer's instructions, there was evidence that petitioner was able to comply with the officer's instructions, and the trial judge, who was in a better position to determine the credibility of the witnesses, found that petitioner willfully refused.

Judge HUNTER, Jr., Robert N., dissenting.

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Appeal by Petitioner from judgment entered 27 March 2008 by Judge Orlando F. Hudson, Jr. in Superior Court, Wake County. Heard in the Court of Appeals 5 May 2009.

*George B. Currin, for petitioner-appellant.*

*Attorney General Roy Cooper, by Assistant Attorney General Jess D. Mekeel, for respondent-appellee.*

WYNN, Judge.

Petitioner Karen Steinkrause<sup>1</sup> was arrested for driving while impaired (DWI) on 23 September 2006 based on evidence surrounding a severe one-car accident, including an officer's observation that she smelled of alcohol. Petitioner blew several times into the Intoxilyzer machine, but did not provide a sufficient breath sample; she claimed that injuries sustained during the accident made it too painful. We now affirm the trial court's determination that probable cause existed for Petitioner's arrest, and that Petitioner willfully refused to submit to a chemical analysis.

On 23 September 2006, Captain K.J. McCray of the North Carolina Highway Patrol was called to the scene of an accident off I-40 in Wake County. Arriving at the scene of the accident, he met with Trooper Kenneth Ellerbe of the North Carolina Highway Patrol who had responded first. The officers found Petitioner Steinkrause's car upside down in a ditch next to an exit ramp, where it had come to rest after having rolled several times. Trooper Ellerbe requested that she submit to a portable breath test (PBT). Petitioner successfully provided one breath sample, and Trooper Ellerbe requested that she submit to another. Petitioner was unable to provide a second sample, claiming that injuries sustained during the accident made it too painful for her to blow into the device.

Petitioner provided a written statement for Trooper Ellerbe, that states in its entirety:

My left front tire looked flat. Couldn't find gas station with air upon leaving Raleigh. Was going to stop again to check air pressure. Having an argument on phone. Car swerved. Felt I could not regain control. Swerved onto inside lane and median, and car flipped. Zero loss of consciousness. Apparently superficial lacerations to left elbow area.

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1. Petitioner's name is spelled Steinkraus in her brief but Steinkrause in the transcript and judgment.

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Captain McCray eventually took over the investigation. Trooper Ellerbe informed Captain McCray that he had smelled an odor of alcohol about Petitioner's person. Trooper Ellerbe also told Captain McCray the results of the first PBT, and that no result was obtained upon his second request. Captain McCray did not himself smell alcohol on Petitioner, but he noticed her clothes were dirty and she looked "sleepy." Based on "the collision, the damage of the vehicle and the testimony of the trooper that was there prior to [his] arrival," Captain McCray believed Petitioner had committed an implied consent offense and placed her under arrest for DWI. After her arrest, Petitioner admitted that she had been drinking prior to the accident.

Petitioner was taken to the City County Bureau of Identification, where she was requested to submit to a chemical analysis of her breath. Captain McCray, a certified chemical analyst, advised Petitioner of her rights, and Petitioner agreed to take the Intoxilyzer test. Captain McCray told Petitioner to blow steadily into the mouthpiece.

According to Captain McCray's testimony, Petitioner attempted to blow four times. Petitioner would blow a little bit, say that it hurt her neck, and then stop. Captain McCray testified that he believed Petitioner was physically able to provide a sample of her breath. He also testified that he did not observe anything that made him believe Petitioner was not making a valid attempt. Captain McCray registered Petitioner as a willful refusal at 6:17 p.m.

Petitioner was notified by the Division of Motor Vehicles ("DMV") that her driver's license was suspended for refusal to submit to a chemical analysis pursuant in N.C. Gen. Stat. § 20-16.2. Petitioner contested the revocation and requested a hearing. Petitioner was granted a hearing before the DMV on 8 December 2006. The DMV sustained the revocation of Petitioner's driver's license. Petitioner requested judicial review of the DMV's decision on 13 December 2006. The hearing was conducted during the 4 March 2008 Civil Session of the Superior Court in Wake County. The court affirmed the revocation of Petitioner's driver's license, entering judgment on 27 March 2008. This appeal followed.

On appeal to this Court, the trial court's Findings of Fact are conclusive if supported by competent evidence, even though there may be evidence to the contrary. *Gibson v. Faulkner*, 132 N.C. App. 728, 732-33, 515 S.E.2d 452, 455 (1999). We review whether the trial court's

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Findings of Fact support its conclusions of law *de novo*. *State v. Campbell*, 188 N.C. App. 701, 704, 656 S.E.2d 721, 724 (2008).

Petitioner argues on appeal that the trial court erred by (I) concluding as a matter of law that she was arrested based upon reasonable grounds, and (II) making Findings of Fact and concluding that she willfully refused to submit to a test of her breath.

## I.

[1] Petitioner first contends that the trial court erred in concluding as a matter of law that she was arrested based upon reasonable grounds. Because the totality of the circumstances supports a finding of probable cause, we disagree.

This appeal arises from a revocation proceeding under N.C. Gen. Stat. § 20-16.2 which authorizes a civil revocation of the driver's license when a driver has willfully refused to submit to a chemical analysis. That statute provides for a civil hearing at which the driver can contest the revocation of her driver's license. The hearing is limited to consideration of whether:

- (1) The person was charged with an implied-consent offense or the driver had an alcohol concentration restriction on the drivers license pursuant to G.S. 20-19;
- (2) The charging officer had reasonable grounds to believe that the person had committed an implied-consent offense or violated the alcohol concentration restriction on the drivers license;
- (3) The implied-consent offense charged involved death or critical injury to another person, if this allegation is in the affidavit;
- (4) The person was notified of the person's rights as required by subsection (a); and
- (5) The person willfully refused to submit to a chemical analysis upon the request of the charging officer.

N.C. Gen. Stat. § 20-16.2(d)(2005).

A civil revocation hearing is not a criminal prosecution. This court has recognized that "[t]he administrative hearing referred to in N.C. Gen. Stat. § 20-16.2(d) . . . is in the nature of a civil proceeding." *Gibson*, 132 N.C. App. at 734, 515 S.E.2d at 455. Elsewhere, we have determined that "the quantum of proof necessary to establish probable cause to arrest in criminal driving while impaired cases and civil

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license revocation proceedings, notwithstanding the different burdens on the remaining elements, is virtually identical.” *Brower v. Killens*, 122 N.C. App. 685, 690, 472 S.E.2d 33, 37 (1996), *disc. review improvidently allowed*, 345 N.C. 625, 481 S.E.2d 86 (1997). Thus, reasonable grounds in a civil revocation hearing means probable cause, and is to be determined based on the same criteria. *See Rock v. Hiatt*, 103 N.C. App. 578, 584, 406 S.E.2d 638, 642 (1991).

A determination of probable cause depends on the totality of the circumstances. *Maryland v. Pringle*, 540 U.S. 366, 371, 157 L. Ed. 2d 769, 773 (2003). “To determine whether an officer had probable cause to arrest an individual, we examine the events leading up to the arrest, and then decide ‘whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to’ probable cause.” *Id.* at 371, 157 L. Ed. 2d at 775 (quoting *U.S. v. Ornelas*, 517 U.S. 690, 696, 134 L. Ed. 2d 911, 919 (1996)). “[P]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.” *Illinois v. Gates*, 462 U.S. 213, 243 n.13, 76 L. Ed. 2d 527, 552 n.13 (1983).

Petitioner does not contest that there was sufficient evidence to support part of the trial court’s Finding of Fact No. 3: that Petitioner was involved in a severe one car accident. Nor does Petitioner contest the sufficiency of the evidence regarding Finding of Fact No. 6: that Trooper Ellerbe conveyed to Trooper McCray that Petitioner had an odor of alcohol on or about her person. Petitioner argues, however, that these findings do not support the trial court’s conclusion that Captain McCray had reasonable grounds to arrest Petitioner.

Regarding the smell of alcohol, an arresting officer is permitted to base his determination of reasonable grounds on information given by one known to him to be reasonably reliable. *Melton v. Hodges*, 114 N.C. App. 795, 798, 443 S.E.2d 83, 85 (1994).

In this case, an officer on the scene smelled an odor of alcohol about the Petitioner. That the arresting officer did not himself make the same observation does not diminish its weight, since a probable cause determination may be based upon the hearsay of a reliable witness. *Id.*; *see also State v. Leonard*, 87 N.C. App. 448, 454, 361 S.E.2d 397, 400 (1987) (“The direct personal observation by the officer/affiant or his fellow officers is plainly a reliable basis for issuance of a warrant.”), *appeal dismissed and disc. review denied*, 321 N.C. 746, 366 S.E.2d 867 (1988). The smell of alcohol could therefore contribute to the officer’s determination of probable cause, and supports

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the trial court's determination that Petitioner was arrested based upon reasonable grounds.

The second factor supporting a determination of probable cause is the nature of the car accident itself. Petitioner is correct to assert that the car accident alone does not support a finding of probable cause. As this Court observed in *State v. Hollingsworth*, the surrounding evidence must also be considered:

Involvement in an automobile accident cannot be said *per se* to provide probable cause sufficient to order a blood alcohol test, but defendant's involvement was due first to a miscalculation in judging the distance between his automobile and [another], then to an inability to prevent his high-speed crossing of the median. These circumstances, known to [the officer] before he ordered the blood drawn, *indicated an impairment of coordination*. [The officer] also smelled the odor of alcohol from the crushed passenger side of defendant's Chevrolet.

*State v. Hollingsworth*, 77 N.C. App. 36, 44, 334 S.E.2d 463, 468 (1985) (emphasis added).

In this case, the record shows that Captain McCray observed the extensive damage to the vehicle at the scene of the accident and could have concluded that it resulted from the driver's inability to prevent her high-speed swerving off the road. The nature of this accident could indicate "an impairment of coordination" of the part of Petitioner. *Id.* Captain McCray was entitled to consider the severity and circumstances of the crash among the totality of the circumstances used to determine probable cause.

The facts of this case resemble *Richardson v. Hiatt*, in which that petitioner was also involved in a one-car accident. 95 N.C. App. 196, 381 S.E.2d 866, *reh'g granted and modified on other grounds*, 95 N.C. App. 780, 384 S.E.2d 62 (1989). The petitioner in that case lost control of his vehicle, it went off the road and ended up in a ditch. The accident happened "when driving conditions were excellent. It occurred on a clear day in the middle of the afternoon." *Id.* at 200, 381 S.E.2d at 868. Petitioner claimed that he fell asleep at the wheel. The only other evidence used to establish probable cause was the smell of alcohol. On appeal, this Court concluded that the officer had probable cause to arrest for DWI. "The evidence surrounding the accident and petitioner's reason for its occurrence, coupled with the strong odor of alcohol detected from him, gave [the officer] reasonable grounds to arrest petitioner for impaired driving." *Id.*

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It is true that in this case, unlike *Richardson*, the trial court did not make any Findings of Fact regarding the driving conditions on the day of the crash. But probable cause to arrest requires only a fair probability of criminal activity; it does not require proof beyond a reasonable doubt, “it does not demand any showing that [the officer’s] belief be correct or more likely true than false.” *Texas v. Brown*, 460 U.S. 730, 742, 75 L. Ed. 2d 502, 513-14 (1983), *see also Church v. Powell*, 40 N.C. App. 254, 252 S.E.2d 229 (1979). It is the fact and severity of the one-car accident coupled with some indication of alcohol consumption on the part of the driver that is determinative of probable cause to arrest.

Accordingly, we hold that the nature of Petitioner’s car accident and the smell of alcohol adequately support the trial court’s Conclusion of Law that Petitioner was arrested based on reasonable grounds.

## II

[2] Petitioner next argues that the trial court erred in its Findings of Fact and Conclusions of Law with respect to Petitioner’s willful refusal to submit to a test of her breath. Because there was competent evidence presented to the trial court that Petitioner willfully failed to follow the officer’s instructions, we disagree.

Refusal has been defined by our Supreme Court as “the declination of a request or demand, or the omission to comply with some requirement of law, as the result of a positive intention to disobey.” *Joyner v. Garrett, Comr. of Motor Vehicles*, 279 N.C. 226, 233, 182 S.E.2d 553, 558, *reh’g denied*, 279 N.C. 397, 183 S.E.2d 241 (1971) (quoting Black’s Law Dictionary, 4th Ed.). Indeed, a “willful refusal” occurs whenever a driver:

(1) is aware that he has a choice to take or to refuse to take the test; (2) is aware of the time limit within which he must take the test; (3) voluntarily elects not to take the test; and (4) knowingly permits the prescribed thirty-minute time limit to expire before he elects to take the test.

*Etheridge v. Peters*, 301 N.C. 76, 81, 269 S.E.2d 133, 136 (1980). “Obviously, one may refuse the test by inaction as well as by words.” *Mathis v. North Carolina Div. of Motor Vehicles*, 71 N.C. App. 413, 415, 322 S.E.2d 436, 438 (1984).

As the State points out in its brief, Petitioner has not assigned error to Findings of Fact Nos. 19 through 22, and these findings are

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therefore binding on appeal. *Campbell*, 188 N.C. App. 701, 656 S.E.2d 721, 724. These findings establish that Petitioner did not provide a valid breath sample to the Intoxilyzer instrument; on several attempts Petitioner stopped blowing after one second and did not provide a continuous sample of breath as instructed; and Petitioner was provided numerous opportunities to provide a valid sample.

Petitioner challenges Finding of Fact No. 23 that Trooper McCray did not observe any physical or medical conditions which would have precluded Petitioner from providing a valid sample of breath. Petitioner contends that the evidence was undisputed that Petitioner was suffering from injuries sustained in her car accident. Petitioner also challenges Finding of Fact No. 24 that Petitioner did not complain of a neck injury until she was at the Intoxilyzer room. Petitioner contends that the State's own evidence indicates that Petitioner complained of neck injury at the scene of the accident.

The essence of Petitioner's objection to Findings of Fact Nos. 23 and 24 is the contention that the trial court did not adequately appreciate Petitioner's injuries. Petitioner does not object to that part of Finding of Fact No. 24 in which the trial court recognized that Petitioner complained that her neck hurt, and that existing neck pains were worsened by the accident. Insofar as this finding is supported by competent evidence, Petitioner can not complain that the trial court did not appreciate her injuries. Captain McCray testified at the hearing that Petitioner appeared to be in good health. This is competent evidence to support Finding of Fact No. 23.

The evidence was contradictory with regard to when Petitioner first complained of the neck injury. Captain McCray testified at one point that Petitioner started complaining of her neck injury "[a]fter the fourth time [Petitioner attempted to blow] and thereafter;" but later he testified that he had not performed field sobriety tests earlier at the scene of the accident because Petitioner complained of her neck injury. As noted above, competent evidence does not mean uncontradicted evidence. Although the testimony was not entirely consistent, there was competent evidence to support Finding of Fact No. 24.

Petitioner also challenges Finding of Fact No. 25 that Trooper McCray would not have requested Petitioner to submit to a test of her breath had she been physically unable to do so. This Finding of Fact is supported by the following excerpt from the transcript:

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Q: If a person is not physically able to provide a sample of—sample on an intoxilyzer instrument, are you going to mark them as a willful refusal?

[Captain McCray]: No, sir.

Q: Did you believe the Petitioner in this case was physically able to provide a sample?

[Captain McCray]: Yes, sir.

Finding of Fact No. 25 is supported by competent evidence.

Petitioner also challenges Finding of Fact No. 26 that Trooper McCray believed Petitioner was physically able to provide a sample of breath. Insofar as Petitioner objects to the admissibility of Captain McCray's belief, this issue was not preserved for appeal. Insofar as Petitioner objects to the Finding of Fact itself, this Finding of Fact is fully supported by the portion of the transcript excerpted above.

Finally, Petitioner challenges Finding of Fact No. 27 that Petitioner did not follow the instructions of Trooper McCray in providing a sample of her breath for chemical analysis. Petitioner concedes that she "ultimately did not provide a valid sample of her breath." Petitioner objects, however, "[t]o the extent that Finding of Fact No. 27 implies that the Petitioner was willfully not following the instructions of Trooper McCray . . . ." This argument is more appropriately directed at the trial court's Conclusions of Law, and is dealt with as such.

Petitioner's argument that the trial court erred in not making additional Findings of Fact is without merit. "It is immaterial that the evidence may support a finding not made by the superior court. Our review is limited to whether competent evidence supports the findings that were made." *Ferguson v. Killens*, 129 N.C. App. 131, 135, 497 S.E.2d 722, 724, *disc. review denied and appeal dismissed*, 348 N.C. 496, 510 S.E.2d 383 (1998). *See also Tolbert v. Hiatt*, 95 N.C. App. 380, 385, 382 S.E.2d 453, 456 (1989) ("[T]he trial court need not recite every evidentiary fact presented at the hearing, but must only make specific findings on the ultimate facts established by the evidence that are determinative of the questions raised in the action and essential to support its conclusions.").

Petitioner's real objection concerns the trial court's Conclusion of Law that she willfully refused to submit to a test of her breath.

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Petitioner contends that “[e]ven if left undisturbed, the trial court’s Findings of Fact Nos. 19 through 27 fail to adequately support the Conclusion of Law . . . .” Petitioner asserts that before the trial court could conclude that there was a willful refusal, it was required to find “a positive intention to disobey” the charging officer and “a voluntary decision to evade the test.” *Joyner*, 279 N.C. at 233, 182 S.E.2d at 558. We note that the State’s burden of proof in this civil action was to establish Petitioner’s willful refusal by a preponderance of the evidence. *Powers v. Tatum*, — N.C. App. —, —, 676 S.E.2d 89, 93, *disc. review denied*, 363 N.C. 583, 681 S.E.2d 784 (2009).

The facts of this case are similar to those in *Tedder v. Hodges*, 119 N.C. App. 169, 457 S.E.2d 881 (1995). The Petitioner in that case was arrested for DWI and taken to a breathalyzer room where he agreed to submit to a chemical analysis. The chemical analyst observed the mandatory waiting period and then requested that Petitioner blow into the machine. “[P]etitioner blew into the machine five or six times, but he never blew long enough for a sufficient sample.” *Id.* at 172, 457 S.E.2d at 883. The officer wrote Petitioner up as a refusal, and Petitioner’s license was revoked pursuant to N.C. Gen. Stat. § 20-16.2. “Petitioner subsequently was treated at Forsyth Memorial Hospital for an injury to his nose and for chest congestion.” *Id.*

Petitioner in *Tedder* petitioned the superior court for a hearing regarding the revocation of his driver’s licence. Petitioner testified that “he could not blow into the machine long enough to provide an adequate sample because he had a history of bronchitis and had been in a fight earlier on the day he tried to blow into the machine.” *Id.* The officer testified that “she could not tell if petitioner physically could not blow into the machine or if he was intentionally not blowing.” *Id.* at 175, 457 S.E.2d at 885. On review, this Court held that the evidence showed petitioner’s failure to follow the instructions of the breathalyzer operator. “Failure to follow the instructions of the breathalyzer operator is an adequate basis for the trial court to conclude that petitioner willfully refused to submit to a chemical analysis.” *Id.* (citing *Bell v. Powell*, 41 N.C. App. 131, 135, 254 S.E.2d 191, 194 (1979)).

Petitioner in *Tedder* argued further that the trial court erred in its refusal to enter judgment on his behalf because the State failed to establish a willful refusal. Petitioner maintained that he attempted to provide an adequate breath sample but could not because of his bronchitis and an injured nose. *Id.*

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While this evidence could have led the trial court to determine that Petitioner did not willfully refuse to blow into the breathalyzer machine, we conclude that there was still competent evidence to support the trial court's conclusion that petitioner willfully refused. When the trial judge is the trier of fact, "he has the duty to pass upon the credibility of the witnesses who testify. He decides what weight shall be given to the testimony and the reasonable inferences to be drawn therefrom. The appellate court cannot substitute itself for the trial judge in this task."

*Id.* at 176, 457 S.E.2d at 885 (quoting *General Specialities Co. v. Nello L. Teer Co.*, 41 N.C. App. 273, 275, 254 S.E.2d 658, 660 (1979)).

In the present case, Petitioner does not dispute Finding of Fact No. 20:

20. With the request to provide a valid sample of breath, the Petitioner placed the mouthpiece into her mouth and blew into the Intoxilyzer instrument for one second and stopped blowing. The Petitioner did not provide a continuous sample of breath as instructed by Trooper McCray.

Thus, Petitioner failed to follow the officer's instructions, and—nothing else appearing—the officer was justified in writing up Petitioner as a refusal. *Bell v. Powell*, 41 N.C. App. 131, 135, 254 S.E.2d 191, 194 (1979). Petitioner contends, however, that the trial court's Conclusion of Law is contrary to the uncontradicted evidence indicating that she did not *willfully* refuse to submit to the test.

While there may be uncontradicted evidence that Petitioner was involved in a severe accident, and that she complained of a neck injury both at the scene and in the breathalyzer room, there is also evidence that Petitioner was not unable to comply with the officer's instructions. She provided a sample of her breath to Trooper Ellerbe when he asked her to submit to a PBT at the scene of the accident. Captain McCray did not observe any coughing, wheezing, or shortness of breath on the part of Petitioner. Finally, Captain McCray testified that he believed Petitioner was physically able to provide a valid sample to the Intoxilyzer.

While Petitioner's injuries were perhaps more recent than those of petitioner in *Tedder*, the issues raised by petitioners in both cases are the same. In both cases, petitioners agreed to submit to a test of their breath and failed to maintain sufficient pressure to provide a valid sample. In both cases, petitioners claimed that physical injuries

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not apparent to the chemical analyst made cooperation impossible. The argument in *Tedder* was perhaps more compelling since there is no evidence that the petitioner in that case had already provided one valid breath sample. See *Tedder*, 119 N.C. App. at 171, 457 S.E.2d at 883 (noting only that petitioner performed poorly on several roadside sobriety tests).

On the basis of *Tedder*, we hold that the trial judge in this case, who was in a better position to determine the credibility of the witnesses, did not err in concluding as a matter of law that Petitioner willfully refused to submit to a test of her breath. “[T]he trial court’s conclusion of law regarding petitioner’s willful refusal is supported by adequate findings and by competent evidence in the record.” *Tedder*, 119 N.C. App. at 177, 457 S.E.2d at 886.

Affirmed.

Judge JACKSON concurs.

Judge HUNTER, Jr. dissents in a separate opinion.

HUNTER, JR., Robert N., Judge, dissenting.

*Facts*

The following evidence was presented to the trial court at the revocation hearing: On the afternoon of 23 September 2006, Karen Steinkrause (“petitioner”) was returning to Wilmington from Raleigh and stopped to have lunch before driving home. At lunch, petitioner had a salad and approximately one glass of wine. Prior to leaving Raleigh, petitioner noticed that the left front tire of her vehicle did not look right and decided to find a place where she could check her tire pressure. As petitioner merged onto Interstate Highway 40, her vehicle started pulling to the left. Petitioner subsequently lost control of her vehicle and it rolled several times before landing upside down in a ditch next to the interstate. Petitioner remained hanging upside down until the rescue personnel arrived, and during that time felt “electric shock” sensations in her neck and arm.

Petitioner suffered lacerations to her left arm as a result of the accident and was concerned about her neck, because she had previously suffered neck injuries from falling off horses, and believed that the accident had exacerbated those injuries. Petitioner, who has a background in nursing, did not agree with how the res-

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cue personnel dressed the wounds on her arm, so she dressed the wounds herself.

At approximately 5:00 p.m., Trooper Kenneth Ellerbe ("Trooper Ellerbe") of the North Carolina Highway Patrol was called to the scene of petitioner's car accident. Upon his arrival, he interviewed petitioner, and she voluntarily made the following written statement:

My left front tire looked flat. . . . Was going to stop again to check air pressure. Having an argument on phone. Car swerved. Felt I could not regain control. Swerved onto inside lane and median, and car flipped. Zero loss of consciousness. Apparently superficial lacerations to left elbow area.

Trooper Ellerbe asked petitioner to submit to a portable breath test ("PBT"). When petitioner attempted to blow into the PBT, she "felt like electricity was going through [her] neck and [her] arms." She told Trooper Ellerbe that "it hurt to bend [her] neck" and that "it hurt to blow" into the PBT. Petitioner successfully provided one breath sample on PBT, but failed to provide a second sample.

Shortly after Trooper Ellerbe administered the PBT, Trooper McCray took over the investigation. Before leaving the scene of the accident, Trooper Ellerbe told Trooper McCray the results of petitioner's first PBT, and that no result was obtained following his second request. Trooper Ellerbe also conveyed to Trooper McCray that he had smelled alcohol on or around petitioner. The results of the PBT were not admitted into evidence at the hearing before the trial court, and therefore, were not considered in its "reasonable grounds" determination.

Trooper McCray testified that he did not smell alcohol on petitioner, nor did he observe any slurred speech or difficulty in communicating. He noticed that petitioner's clothes were dirty as a result of having to be pulled out of her car, and made the following observations of petitioner in his report: "clothing, dirty and sleepy." He also noted in his report that petitioner "claimed [her] neck was hurt." Based on "the collision, the damage of the vehicle and the testimony of Trooper Ellerbe prior to arrival," Trooper McCray believed petitioner had committed an implied consent offense and placed her under arrest for driving while impaired.

*Analysis*

Petitioner contends that the trial court erred in concluding as a matter of law that she was arrested "based upon reasonable

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grounds.” Petitioner argues that the conclusion was not supported by the trial court’s findings of fact. I agree that petitioner was not arrested on reasonable grounds, and therefore, pursuant to N.C. Gen. Stat. § 20-16.2 (2007), I believe her driver’s license should not be revoked. *See* N.C.G.S. § 20-16.2.

Because we do not have evidence of the result of petitioner’s PBT, the only factual findings regarding Trooper McCray’s probable cause to arrest petitioner concerns her car accident and Trooper Ellerbe’s statement that he had detected an odor of alcohol. Based on the totality of the circumstances, there appears to be insufficient factual findings to support the conclusion that petitioner was arrested based upon reasonable grounds.

While involvement in an automobile accident can contribute to the totality of the circumstances, it is not sufficient *per se* to provide probable cause of an implied consent offense. *State v. Hollingsworth*, 77 N.C. App. 36, 44, 334 S.E.2d 463, 468 (1985). In *Richardson v. Hiatt*, 95 N.C. App. 196, 381 S.E.2d 866 (1989), the petitioner was involved in a one-car accident at approximately 3:00 p.m, when his vehicle went off the road into a ditch. *Id.* at 197, 381 S.E.2d at 867. On appeal, this Court concluded that probable cause existed to arrest the petitioner, because the accident “occurred when driving conditions were excellent . . . on a clear day in the middle of the afternoon.” The petitioner told the arresting officer that he had fallen asleep at the wheel, and the officer detected a strong odor of alcohol on the petitioner. *Id.* at 200, 381 S.E.2d at 868.

The petitioner in *Moore v. Hodges*, 116 N.C. App. 727, 449 S.E.2d 218 (1994), was also involved in a one-car accident. *Id.* at 730, 449 S.E.2d at 220. In that case, we held that the facts were sufficient to support a finding of probable cause given that the petitioner admitted that the accident was her fault, she had been drinking liquor earlier that evening, she smelled of alcohol, she had mumbled speech, and registered .10 or higher on the alcosensor. *Id.*; *see also State v. Tedder*, 169 N.C. App. 446, 448-51, 610 S.E.2d 774, 776-77 (2005) (finding substantial evidence of impairment where officer smelled alcohol, the defendant swayed when standing, slurred her speech, and was unable to recite the alphabet); *State v. Thomas*, 127 N.C. App. 431, 434, 492 S.E.2d 41, 43 (1997) (holding that there was probable cause to justify the defendant’s arrest due to his disorderly appearance, red glassy eyes, strong odor of alcohol, and inability to produce a driver’s license or registration); *State v. Rogers*, 124 N.C. App. 364, 369, 477 S.E.2d 221, 223-24 (1996) (finding probable cause where the police

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officer smelled a strong odor of alcohol on the defendant and the defendant had a blood alcohol concentration of .13).

Here, petitioner contends that the undisputed evidence at trial shows that her car accident was caused by her left front tire, and that this mechanical failure was not indicative of any fault or impairment on her part. However, such evidence is not included in the trial court's findings. Furthermore, "[p]robable cause exists if the facts and circumstances *at that moment* within the charging officer's knowledge and of which the officer had reasonably trustworthy information are such that a prudent man would believe that the suspect had committed or was committing an offense." *Moore*, 116 N.C. App. at 730, 449 S.E.2d at 220 (emphasis added). The trial court made the following factual findings about petitioner's accident:

1. Around 5:00 p.m. on September 26th, 2006, Trooper K.J. McCray of the North Carolina Highway Patrol was called to the scene of an accident off of I-40 in Wake County.
2. Upon [their] arrival . . . [t]he Troopers discussed the wreck and the driver of the vehicle, the Petitioner.
3. Petitioner was involved in a single car accident, wherein the vehicle she operated drove off the side of the entrance ramp to I-40. The vehicle rolled several times until it came to a stop in a ditch off of the side of the interstate.

Unlike *Richardson* and *Moore*, the trial court made no factual findings regarding the weather or driving conditions nor did it find that the accident was petitioner's fault.

Respondent claims that we should infer that the driving conditions were ordinary, since the factual findings did not state otherwise. This is an impermissible speculation, which cannot be used to support probable cause. Moreover, because petitioner did not admit to consuming alcohol until after her arrest, Finding of Fact No. 9 cannot be considered in our reasonable grounds determination. There are no findings about a positive result of testing for alcohol, nor are there factual findings that petitioner exhibited signs of alcohol use such as slurred speech or difficulty communicating.

The only other factual finding that is relevant to the conclusion is that "Trooper Ellerbe conveyed to Trooper McCray that the Petitioner had an odor of alcohol on or about her person." Contrary to the cases discussed above, Trooper McCray did not smell alcohol on petitioner,

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but was told by Trooper Ellerbe that Trooper Ellerbe had detected an odor of alcohol. Respondent is correct that an arresting officer is permitted to base his determination of reasonable grounds “upon information given to the officer by another, the source of the information being reasonably reliable[.]” *Melton v. Hodges*, 114 N.C. App. 795, 798, 443 S.E.2d 83, 85 (1994). Given the circumstances of this case, we recognize that Trooper McCray did not detect an odor of alcohol on petitioner at any point in his investigation.

Trooper McCray had a sufficient opportunity to observe petitioner independently and corroborate Trooper Ellerbe’s information. The fact that Trooper McCray failed to detect an odor of alcohol on petitioner, even after Trooper Ellerbe had told him that he had, weakens the reliability of Trooper Ellerbe’s observation. While the probable cause standard may be incapable of precise definition, in light of the evidence presented in this case, it is difficult to say a reasonably prudent or cautious person would suspect that petitioner was driving while intoxicated.

Trooper McCray’s second-hand account of an odor of alcohol, which he was unable to independently corroborate after sufficient opportunity, in combination with a car accident is not sufficient to support a finding of probable cause. Thus, in my opinion, the trial court erred in its conclusion that petitioner was arrested based upon reasonable grounds.

*Conclusion*

Because I believe the trial court erred in concluding that there were reasonable grounds to arrest petitioner for an implied consent offense, her driver’s license should not be revoked under N.C. Gen. Stat. § 20-16.2. *See* N.C. Gen. Stat. § 20-16.2. Accordingly, I respectfully dissent.

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BRADLEY-REID CORPORATION, SANDRA BRADLEY-REID, PETITIONER v. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF PUBLIC HEALTH, RESPONDENT

No. COA08-1519

(Filed 8 December 2009)

**1. Administrative Law—judicial review of agency decision—decertification of HIV case management services**

The trial court did not err by reversing an administrative law judge's determination that petitioner corporation's decertification as a provider of HIV case management services by the North Carolina Department of Health and Human Services (DHHS) was unjustified. Substantial evidence supported the trial court's findings of fact that the violations found by DHHS at the corporation were systemic.

**2. Administrative Law—judicial review of agency decision—arbitrary and capricious standard—substantive due process**

The trial court's decision upholding a Department of Health and Human Services (DHHS) decertification of petitioner corporation as an HIV case management provider was not arbitrary or capricious. The evidence revealed that other HIV case management providers included in the record did not have problems similar to petitioner and petitioner had notice of the DHHS certification requirements. Further, petitioner was not denied substantive due process, and decertification would ensure that funds provided for public assistance would be protected.

Appeal by petitioner from order entered 1 August 2008 by Judge Beverly T. Beal in Superior Court, Mecklenburg County. Heard in the Court of Appeals 18 August 2009.

*Pamela A. Hunter, for petitioner-appellants.*

*Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Mabel Y. Bullock, for respondent-appellee.*

STROUD, Judge.

Bradley-Reid Corporation ("Bradley-Reid") appeals a trial court order reversing an administrative law judge's determination that it's decertification as a provider of HIV case management services

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by the AIDS Care Unit at the North Carolina Department of Health and Human Services, Division of Public Health (“DHHS”) was unjustified. Because substantial evidence supports the trial court’s findings of fact that the violations found at Bradley-Reid by DHHS were systemic, and the agency’s decision was not arbitrary or capricious, we affirm.

### I. Background

In December 2003, Bradley-Reid was certified as a provider of HIV Case Management Services by DHHS. Pursuant to N.C. Gen. Stat. § 108A-25(b)<sup>1</sup>, DHHS promulgated 10A North Carolina Administrative Code 220.0124 (2005), which lists the components that are required for “HIV CASE MANAGEMENT.” Each provider is certified initially for three years. At the end of the third year, DHHS’ AIDS Care Unit conducts a “Quality Assurance” site visit to ensure that providers are adhering to those component requirements in 10A N.C. Admin. Code 220.0124 by reviewing agency policies, supervision logs provided for case managers, client satisfaction surveys, and client records.

On 20 September 2006, a Quality Assurance visit was conducted to review Bradley-Reid’s HIV Case Management Service program. By Decertification Letter dated 3 November 2006, DHHS notified Bradley-Reid of its “intent to decertify Bradley-Reid Corporation as a provider of HIV Case Management services in Cabarrus, Gaston, Mecklenburg, Anson, Iredell and Union counties effective thirty (30) days from the date of this letter.” (emphasis omitted). The Decertification Letter stated that the intent to decertify Bradley-Reid was based on “findings from the Quality Assurance review completed on September 20, 2006.”

On or about 30 November 2006, Bradley-Reid filed a Petition for a Contested Case and Supplemental Petition for a Contested Case. On 9 May 2007, an administrative hearing was held before Administrative Law Judge Sammie Chess, Jr. (“ALJ”). On 20 August 2007, the ALJ reversed Bradley-Reid’s decertification. DHHS’ Final Agency Decision did not adopt the ALJ’s reversal but upheld DHHS’ decertification of Bradley-Reid. Bradley-Reid filed a Petition for Judicial Review and Request for Stay in Superior Court, Mecklenburg County on or about 28 November 2007.

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1. N.C. Gen. Stat. § 108A-25(b) (2007) states, “The program of medical assistance is established as a program of public assistance and shall be administered by the county departments of social services under rules adopted by the Department of Health and Human Services.”

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The matter was heard on 21 April 2008 by the Honorable Beverly T. Beal, in Superior Court, Mecklenburg County and by Order dated 1 August 2008, Judge Beal affirmed DHHS' decertification of Bradley-Reid. As required by N.C. Gen. Stat. § 150B-51(c) (2007), the trial court made findings of fact and conclusions of law. The trial court ordered that "the decision of [DHHS] in decertifying [Bradley-Reid] as an HIV case management agency, is adopted, and is upheld." On 28 August 2008, Bradley-Reid gave notice of appeal.

**II. Substantial Evidence of Violations**

[1] Bradley-Reid contends that there is "no substantial evidence presented by [DHHS] to prove that the violations of [Bradley-Reid] were systemic and therefore [Bradley-Reid] . . . deserve[d] the opportunity to make corrective actions to said alleged violations prior to decertification."

When this Court reviews an agency decision "[t]he scope of review to be applied . . . is the same as it is for other civil cases. In cases reviewed under G.S. 150B-51(c), the court's findings of fact shall be upheld if supported by substantial evidence." N.C. Gen. Stat. § 150B-52 (2007). Further, "[w]hen this Court reviews appeals from superior court either affirming or reversing the decision of an administrative agency, our scope of review is twofold . . . : (1) whether the superior court applied the appropriate standard of review and, if so, (2) whether the superior court properly applied this standard." *Corbett v. N.C. DMV*, 190 N.C. App. 113, 118, 660 S.E.2d 233, 237 (2008) (citation and quotation marks omitted).

N.C. Gen. Stat. § 150B-51(c) (2007) gives the standard of review for a trial court from a final decision by an administrative law judge in a contested case in which the agency *does not* adopt the administrative law judge's decision:

the court shall review the official record, de novo, and shall make findings of fact and conclusions of law. In reviewing the case, the court shall not give deference to any prior decision made in the case and shall not be bound by the findings of fact or the conclusions of law contained in the agency's final decision. The court shall determine whether the petitioner is entitled to the relief sought in the petition, based upon its review of the official record. The court reviewing a final decision under this subsection may adopt the administrative law judge's decision; may adopt, reverse, or modify the agency's decision; may remand the case to

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the agency for further explanations under G.S. 150B-36(b1), 150B-36(b2), or 150B-36(b3), or reverse or modify the final decision for the agency's failure to provide the explanations; and may take any other action allowed by law.

N.C. Gen. Stat. § 150B-51(c).

The case *sub judice* is a contested case in which DHHS did not adopt the administrative law judge's decision and therefore the requirements of N.C. Gen. Stat. § 150B-51(c) apply. The trial court made findings of fact and conclusions of law and stated that it reviewed the official record *de novo* pursuant to the requirements of G.S. 150B-51(c). We next determine whether the trial court properly applied the *de novo* standard of review when it affirmed the agency's decision. *Corbet*, 190 N.C. App. at 118, 660 S.E.2d at 237.

Pursuant to N.C. Gen. Stat. § 150B-52 (2007), we are to consider whether the findings of fact are supported by "substantial evidence," defined as "relevant evidence as a reasonable mind might accept as adequate to support a conclusion, even if contradictory evidence may exist." *Cape Med. Transp., Inc. v. N.C. Dep't of Health & Human Servs.*, 162 N.C. App. 14, 22, 590 S.E.2d 8, 14 (2004) (citation and quotation marks omitted).

The trial court's findings three, four, and five relate to Bradley-Reid's first contention. The trial court found:

3. Certain records are required to be kept by an agency. To provide an audit trail, a provider must keep the following documents for a minimum of five years from the date of service: Assessments and service plans, documentation of the case managers HIV case management activities including description of HIV case management activities, dates of service, amount of time involved in HIV case management activities in minutes, records of referrals to providers and programs, records of service monitoring and evaluations and claims for reimbursement. Progress notes are required to be kept on each person provided services by an agency. There is no required form for the progress notes, but they must contain certain basic information and be kept in the individual file of the client. Basic information includes the name of the client, the date of services, the billable units (BU's), a statement of the services provided at that time, and signing by the case manager. An agency is required to have an internal quality assurance policy and it is requested that an agency use a chart review tool.

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Substantial evidence shows that HIV case management service providers are required to keep certain documentation to provide an audit trail for DHHS and permit access to and examination of that documentation by DHHSs AIDS Care Unit. Providers are required to sign a Medicaid Participation Agreement which states they must “Comply with the federal and state laws, regulations, state reimbursement plan and policies governing the services authorized under the Medicaid Program[,]” maintain certain records and those records are subject to audit or review by Federal and State representatives at any time during hours of operation. Also, “billings and reports related to services to Medicaid patients and the cost of that care must be submitted in the format and frequency specified by [the Division of Medical Assistance] and/or its fiscal agent . . . .” Further, 10A North Carolina Administrative Code 220.0124(a)(3) requires that “[i]n order to be reimbursed by the Division of Medical Assistance, a provider shall provide . . . (3) Development and implementation of a plan of care which includes goals, services to be provided and *progress notes*[.]” (emphasis added) There is no set format or form for progress notes but they must contain the required information. Progress notes must contain time spent on an activity; the month, day and year of contact; and “should be written and signed by the case manager completing the contact or activity.” Progress note documentation should “substantiate the number of units billed for service delivery.” Case managers are required to sign and date each entry for handwritten progress notes and progress notes on a computer must be printed and signed. Each provider is required to keep an internal quality assurance policy and develop a chart review tool. As the above substantial evidence supports the trial court’s findings regarding DHHS’ requirements for HIV Case Management Services, this assignment of error is overruled.

Next, the trial court found:

4. On September 20, 2006 a team from HIV Case Management conducted a QA visit to Petitioner’s business. Petitioner had been notified of the intended visit in advance. Marsha Beth Karr and Robert Winstead were members of that team. They are Respondent’s employees. Previously Mr. Winstead had . . . conducted two TA visits to Petitioner. At those visits inconsistencies were found, but they were not severe enough to warrant decertification. At the QA visit 16 or 17 client files (or charts) were examined. Respondent has a client base of 60. Some of the files had been pre-selected by Petitioner’s employees. Additional files

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were reviewed at random. All four of the case managers of Petitioner were failing to write progress notes, not completing reassessments, and not completing care plans. At that time those files were found to contain records intended to be progress notes, in the form of sticky notes or pieces of paper. Some notes did not contain the date of activity, or did not contain client identifying information, or did not contain the billable amount of time spent on the service. Some progress notes were not in chronological order and not signed by the case manager. In one file, missing progress notes existed, but not in the proper file. They were later found by Petitioner's employee in another client's chart. That error was not corrected on the day of the QA visit, and a request to correct the error was not made later. Care plans were not up to date and signed. Copies of internal QA reviews were requested, but they were not produced. In three Charts, where annual reassessments of clients were done, the Petitioner had clients sign blank paperwork including care plans. Ms. Ellen Reid handed Mr. Winstead a couple of charts and said, "Now I don't have all the paperwork up-to-date in these. I've been busy. I haven't had time to get it done" (Transcript page 103). Medicaid had been billed for activity, but the QA visit team could not match up those billing profiles with documentation in the charts. Petitioner's employees had attended training provided by contractor Duke University and the AIDs Care Unit HIV Case Management Program.

We find that substantial evidence supports the trial court's finding regarding violations DHHS discovered at the 20 September 2006 Quality Assurance visit to Bradley-Reid. Robert Winstead ("Mr. Winstead"), a public health program consultant with the AIDS Care Unit at DHHS, testified that in September of 2006, he and Beth Karr ("Ms. Karr"), supervisor of the HIV Case Management Program for the AIDS Care Unit at DHHS, conducted a Quality Assurance site visit at Bradley-Reid. They reviewed files or charts pre-selected by Bradley-Reid and additional charts pulled by Mr. Winstead and Ms. Karr. At the time of the Quality Assurance site visit, Bradley-Reid had approximately sixty clients and sixteen or seventeen charts were reviewed. When Mr. Winstead and Ms. Karr pulled the random charts, they noticed that Bradley-Reid's four case managers were not consistently writing progress notes and completing reassessments and care plans. Mr. Winstead stated that "in numerous charts they didn't have progress notes, . . . they had these slips of paper that didn't contain the correct information to constitute a progress note." Additionally,

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progress notes were not signed or in chronological order and did not include a column with the units of service listed. Mr. Winstead testified that “[Bradley-Reid] had billed Medicaid based on our Medicaid billing profile for activity, but [Mr. Winstead and Ms. Karr] could not match up those billing profiles with documentation they had because . . . the Post-it notes and the scratch pieces of paper didn’t have client identifying information on [them].” Therefore, they could not tell if a note in the chart really belonged to that client or not. Sandra Reid, a supervisor and case manager at Bradley-Reid, testified that records were put in the wrong client’s file, and she did not correct this error the day of the Quality Assurance visit or make a request to DHHS for a correction. Bradley-Reid could not produce copies of their Quality Assurance reviews. Mr. Winstead also observed that “in charts where annual reassessments were done, [Bradley-Reid] had gone out and gotten clients to sign blank paperwork” making him question the quality of care Bradley-Reid’s clients actually received. Mr. Winstead testified that when he and Ms. Karr started pulling random charts, Ellen Reid, another supervisor and case manager at Bradley-Reid, handed Mr. Winstead “a couple of charts and said, ‘Now I don’t have all the paperwork up-to-date in these. I’ve been busy. I haven’t had time to get it done.’” Bradley Reid’s case managers attended HIV Case Management service provider training titled “Advanced Case Management Resource Day; Best Practices in HIV Case Management: Progress Notes and Ethics” on 22 July 2005 contracted by Duke University and the HIV Case Management Program. As the above substantial evidence supports the trial court’s findings regarding the various violations DHHS found at the 20 September 2006 Quality Assurance visit to Bradley-Reid, this assignment of error is overruled.

Next, the trial court found:

5. Other QA visits to other certified agencies have been conducted by the HIV Case Management Program, and Ms. Karr and Mr. Winstead as employees thereof. Various actions have been taken by the Respondent in those cases, in response to deficiencies found. Some agencies are allowed an opportunity to correct problems found, and not decertified. Some agencies were not allowed corrective action and were decertified as a result of QA visits. One key consideration at a QA visit is determination of whether a problem, such as maintaining proper progress notes, is systemic for the agency, involving performance by multiple case managers.

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There is substantial evidence in the record supporting the trial court's finding regarding how DHHS has dealt with deficiencies in case management programs as well as its finding that the violations of Bradley Reid were systemic. Mr. Winstead testified in regard to the determination of whether or not corrective action is allowed stating:

[W]e look at first is, when we're looking at the work that's being produced by case managers in an agency, we look to see if there's problems, is it a problem that one case manager has, is it a problem that all the case managers have, meaning that it's more systemic and that everybody's doing something wrong, doing the same thing wrong. We also look at whether or not billing has occurred when progress notes did not exist. What we will often see or sometimes see is that agencies have not written progress notes, but they didn't bill for [Medicaid reimbursement] what they say they've provided . . . And if they didn't bill Medicaid for reimbursement, then we don't really know how we can do anything because there's nothing to recoup. There's no referral to make to Program Integrity in terms of a recoupment—potential recoupment because they didn't bill for the service.

Mr. Winstead stated the following reasons that corrective action was not allowed for Bradley-Reid:

Because when we looked at the charts—when we pulled the random charts, what we saw was that each—we pulled work from each of the four case managers, and what we saw was that all four of the case managers were not writing progress notes, were not completing reassessments, were not completing care plans. So it appeared to us that it was a systemic problem that all the case managers were participating in . . . . [T]hey had billed Medicaid based on our Medicaid billing profile for activity, and we could not match up those billing profiles with documentation they had because, as I said earlier, the Post-it notes and the scratch pieces of paper didn't have client identifying information on it. So I couldn't tell if a note in this chart really belonged to that person or not.

As substantial evidence shows that none of the four case managers at Bradley-Reid were consistently preparing proper progress notes and keeping other required records, so that Mr. Winstead and Ms. Karr could not match up with the required documentation for

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Medicaid billing, the trial court properly found that the problems with Bradley-Reid were systemic and DHHS was justified in not allowing corrective action. Accordingly, this assignment of error is also overruled.

## III. Arbitrary and Capricious

[2] Bradley-Reid next contends that DHHS' actions in decertifying it as an HIV case management provider were arbitrary and capricious, and the trial court erred as a matter of law in affirming DHHS' decision. Both Bradley-Reid and DHHS argue that a "whole record test" should be applied, which involves examining "all of the competent evidence, including that which contradicts the agency's conclusion." However, DHHS argues that the trial court "is not permitted to override decisions within agency discretion when that discretion is exercised in good faith and in accordance with law." In contrast, N.C. Gen. Stat. § 150B-51(c) requires a *de novo* review:

the court shall review the official record, *de novo*, and shall make findings of fact and conclusions of law. *In reviewing the case, the [trial] court shall not give deference to any prior decision made in the case and shall not be bound by the findings of fact or the conclusions of law contained in the agency's final decision[.]*

N.C. Gen. Stat. § 150B-51(c) (emphasis added). In *Cape Med. Transp., Inc. v. N.C. Dep't of Health and Human Services*, 162 N.C. App. 14, 23, 590 S.E.2d 8, 14 (2004), this Court, addressed whether an agency decision was arbitrary and capricious in the context of a trial court's G.S. § 150B-51(c) review. The Court stated that it was the "legislative intent behind section 150B-51(c) [] to increase the judicial scope of review in cases which an agency rejects [an administrative law judge's] decision" and rejected a "whole record" test as applicable to G.S. § 150B-51(c). *Cape Med. Transp.*, 162 N.C. App. at 21-22, 590 S.E.2d at 13-14. The Court went on to apply the G.S. § 150B-51(c) standard of review, stating that "[a]n agency's decision is arbitrary and capricious if it lacks 'fair and careful consideration . . . [or] fail[s] to indicate 'any course of reasoning and exercise of judgment.' " *Id.* at 22-23, 590 S.E.2d at 14. As stated above we have determined that the trial court properly applied the standard from N.C. Gen. Stat. § 150B-51(c). *Corbett*, 190 N.C. App. at 118, 660 S.E.2d at 237. We next determine whether the superior court properly applied the *de novo* standard, in addressing Bradley-Reid's remaining contentions that DHHS' actions were arbitrary and capricious. *Id.*

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**A. Other HIV Case Management Service Providers**

Specifically, Bradley-Reid contends that DHHS' decertification was arbitrary and capricious because other providers with deficiencies more egregious than those cited at Bradley-Reid had been allowed to submit corrective action plans and were not decertified, but Bradley-Reid was not allowed the opportunity to take any corrective action prior to being decertified by DHHS.

The trial court made finding of fact number five regarding DHHS' review of other HIV case management providers:

Some agencies are allowed an opportunity to correct problems found, and not decertified. Some agencies were not allowed corrective action and were decertified as a result of QA visits. One key consideration at a QA visit is determination of whether a problem, such as maintaining proper progress notes, is systemic for the agency, involving performance by multiple case managers.

Mr. Winstead testified in regard to the determination of whether or not corrective action is allowed:

[W]e look at first is, when we're looking at the work that's being produced by case managers in an agency, we look to see if there's problems, is it a problem that one case manager has, is it a problem that all the case managers have, meaning that it's more systemic and that everybody's doing something wrong, doing the same thing wrong. We also look at whether or not billing has occurred when progress notes did not exist. What we will often see or sometimes see is that agencies have not written progress notes, but they didn't bill for [Medicaid reimbursement] what they say they've provided . . . . And if they didn't bill Medicaid for reimbursement, then we don't really know how we can do anything because there's nothing to recoup. There's no referral to make to Program Integrity in terms of a recoupment—potential recoupment because they didn't bill for the service.

As stated above, the trial court's findings of fact and substantial evidence in the record show that all four case managers at Bradley-Reid were not correctly filling out progress notes and billing for services and that Mr. Winstead and Ms. Karr could not match up the required documentation.

Substantial evidence in the record shows that other HIV case management providers referred to by Bradley-Reid at the hearing

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were allowed corrective action because decertification was not warranted. DHHS allowed Mecklenburg County Health Department and HIV case management provider to take corrective action. As defendant points out, the DHHS Quality Assurance review team discovered that some Mecklenburg County Health Department charts did not contain progress notes. However, unlike Bradley-Reid, this incident only involved one case manager and “they had not billed for the charts in question.”

Mr. Winstead and Ms. Karr also testified regarding a Quality Assurance visit to Living Water CDC, another HIV case management service provider that DHHS allowed corrective action. Mr. Winstead stated that the agency director was converting all of their records for electronic storage, including the progress notes. Due to a malfunctioning printer, the supervisor was unable to print the progress notes. However, the supervisor was able to show Mr. Winstead on the computer screen progress notes for the charts they were reviewing. Mr. Winstead made a subsequent visit and saw the printed and signed progress notes.

Quality Assurance visit reports from other HIV case management service providers, Metrolina AIDS Project and Western North Carolina Community Health Services, included in the record, document some errors in a few progress notes and billing procedures but unlike Bradley-Reid, those problems did not extend to all of their case managers.

As there was substantial evidence supporting the trial court's findings regarding other HIV case management providers allowed to make corrections, the assignment of error regarding this finding of fact is overruled. N.C. Gen. Stat. § 150B-52. This evidence shows that unlike Bradley-Reid, other HIV case management providers included in the record that were allowed corrective action did not have problems with all of their case managers correctly filling out progress notes and billing for services that did not match up to their documentation. Therefore, DHHS' actions in decertification of Bradley-Reid and not allowing corrective action were not arbitrary or capricious.

**B. Notice of DHHS Requirements**

Bradley-Reid also argues that DHHS' decision was arbitrary and capricious because Bradley-Reid and others similarly situated have “no idea of what problems or circumstances would cause them to be decertified” and DHHS failed to give “any policy or procedure

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which required [Bradley-Reid] to maintain Progress Notes in a specific manner.”

The trial court made findings of fact two and three<sup>2</sup> regarding training and the requirements of progress notes for HIV case management providers. Finding of fact two states in pertinent part:

2. Certified agencies are provided with training . . . and an HIV Case Management Provider Manual . . . . The HIV Case Management Program conducts quality assurance site visits (QA visits) to agencies. Technical Assistance visits (TA visits) are also conducted by the HIV Case management Program. The purpose of a TA visit is to review a new agency's work to give them some feedback as to what they may not be doing correctly. A newly certified agency is entitled to four TA visits within the first year of certification.

Substantial evidence in the record shows that a *HIV Case Management Provider Manual* (April 1994) is provided to an applicant when it submits an application to become a HIV case management provider. This manual is used by DHHS to inform HIV case management providers of the “HIV CASE MANAGEMENT” requirements of 10A N.C. Admin. Code 220.0124. 10A N.C. Admin. Code 220.0124 states, among other requirements, that “In order to be reimbursed by the Division of Medical Assistance, a provider shall provide all of these components: . . . . (3) Development and implementation of a plan of care which includes goals, services to be provided and *progress notes*[.]” (emphasis added). The *HIV Case Management Provider Manual* (April 1994) restates this requirement for progress notes in “Section II: HIV CASE MANAGEMENT SERVICES PROGRAM GUIDELINES” in the “HIV Case Management” chapter under “Core Components.” The same requirement for progress notes is also repeated in the “Assessment” chapter in the manual, stating that “The client record should include a care plan . . . dated and signed by the case manager and the client, which includes . . . . Signed and dated *progress notes*. . . .” (emphasis added).

In addition, DHHS’ AIDS Care Unit provides training for HIV case management providers and staff, including training as to preparation of progress notes. At that training, HIV case management staff learn about the details required in progress notes and that progress notes are to be signed. During training, HIV case management providers and staff are given a copy of the training materials. Case

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2. The trial court’s finding of fact number three is quoted in Part II *supra*.

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managers from Bradley-Reid attended one of these training sessions on 22 July 2005, titled "Advanced Case Management Resource Day; Best Practices in HIV Case Management: Progress Notes and Ethics." Training materials provided that day to the HIV case management providers in attendance state that a "case manager must sign each entry for hand written Progress Notes." Additionally, those materials note that progress notes must contain time spent on the activity; the month, day and year of contact; "should reflect appropriate billing"; and "should substantiate the number of units billed for service delivery."

Ms. Karr testified that the AIDS Care Unit consultants send a memorandum to all certified HIV case management providers describing their findings after completing Quality Assurance reviews for that year. The purpose of the memo is to inform all HIV case management providers of the types of non-compliance issues discovered during Quality Assurance reviews so HIV case management providers would be aware of those findings and could take appropriate steps to comply with requirements before a Quality Assurance visit. Included in this memorandum was the information regarding progress notes, including requirements that electronic progress notes must be printed and signed and each handwritten entry must be signed.

Bradley-Reid's own "HIV Case Management Review" form requires that progress notes be signed, in chronological order, legible and neat. Sandra Reid testified that she was familiar with the requirements that progress notes have the description of the activity, the time, the date and a signature, and she attended the training in July 2005 that was specifically on progress notes. Bradley-Reid's 2003 certification letter stated that "[f]or specific questions regarding the implementation of your case management program, please call the district case management consultant for your area." Mr. Winstead testified that he had conducted two technical assistance visits with Bradley-Reid and during these visits found some inconsistencies in their progress notes not severe enough to warrant decertification. However, Bradley-Reid did not contact Mr. Winstead or Ms. Karr to ask any questions concerning the required progress notes.

Substantial evidence shows that Bradley Reid and other similarly situated HIV case management providers had notice as to DHHS' requirements to remain certified, supporting the trial court's findings. N.C. Gen. Stat. § 150B-52. Therefore, we cannot say that DHHS did not give "fair and careful consideration" or that DHHS's decision "fail[ed] to indicate 'any course of reasoning and exercise of judg-

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ment.’” *Cape Med. Transp.*, 162 N.C. App. at 23, 590 S.E.2d at 14. Bradley-Reid’s argument is overruled.

**C. Substantive Due Process**

Bradley-Reid also argues DHHS “acted in an arbitrary and capricious manner in administering the rules and laws applicable to the case management service program[,]” thus amounting to a violation of Bradley-Reid’s substantive due process rights.

“Substantive due process denotes a standard of reasonableness and limits a state’s exercise of its police power . . . . *Beneficial N.C. v. State ex rel. North Carolina State Banking Comm’n*, 126 N.C. App. 117, 127, 484 S.E.2d 808, 814 (1997).

Under North Carolina jurisprudence, state ‘due process’ is governed by Section 19 of the Constitution of North Carolina, which provides that ‘[n]o person shall be deprived of his life, liberty, or property, but by the law of the land.’ N.C. Const. art. I, § 19. Although this Court often considers the ‘law of the land’ synonymous with ‘due process of law,’ see *A-S-P Assocs. v. City of Raleigh*, 298 N.C. 207, 258 S.E.2d 444 (1979), we have reserved the right to grant Section 19 relief against unreasonable and arbitrary state statutes in circumstances where relief might not be obtainable under the Fourteenth Amendment to the United States Constitution, see *Lowe v. Tarble*, 313 N.C. 460, 329 S.E.2d 648 (1985).

*Meads v. North Carolina Dep’t of Agric., Food & Drug Protection Div., Pesticide Sec.*, 349 N.C. 656, 671, 509 S.E.2d 165, 175 (1998). “The traditional substantive due process test has been that a statute must have a rational relation to a valid state objective.” *Beneficial N.C.*, 126 N.C. App. at 127, 484 S.E.2d at 814 (citation and quotation marks omitted).

However, Bradley-Reid does not challenge the validity of any statute or rules. Rather, it contends the traditional substantive due process test should be applied to invalidate the trial court’s adjudicatory decision upholding Bradley-Reid’s decertification. We conclude that the trial court’s decision did not violate Bradley-Reid’s substantive due process rights.

N.C. Gen. Stat. § 108A-25(b) states that the goal of a program of medical assistance, such as the HIV case management services, is to provide “a program of public assistance . . . under rules adopted by the Department of Health and Human Services.” The trial court’s

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decision is rationally related to the N.C. Gen. Stat. § 108A-25(b) goal of providing “a program of public assistance[,]” as supported by the trial court’s findings of fact, conclusions of law and substantial record evidence.

The trial court’s finding of fact number two states “Services provided by a certified agency are reimbursed by federal funds from the Division of Medical Assistance.” The trial court’s decision shows that it perceived that Bradley-Reid’s lack of proper progress notes prevented DHHS from being able to accurately account for funds allotted by the Division of Medical Services for this program of public assistance. Given that this problem was evident in all four case managers at Bradley-Reid, decertification would ensure that funds provided for public assistance would be protected. Accordingly, we find no substantive due process right violated in the trial court’s decision to affirm DHHS’ decertification of Bradley-Reid.

## IV. Conclusion

As substantial evidence supports the trial court’s findings that the violations found at Bradley-Reid by DHHS were systemic and substantial evidence supports that the agency’s decision was not arbitrary or capacious, we affirm the trial court’s order reversing the administrative law judge’s decision and affirming decertification of Bradley-Reid.

Affirm.

Judges WYNN and BEASLEY concur.

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STATE OF NORTH CAROLINA v. MARTINA ELIZABETH CLARK, DEFENDANT

No. COA09-63

(Filed 8 December 2009)

**1. Assault— with deadly weapon on government official—  
instruction on lesser included offense not given—plain  
error**

The trial court committed plain error in a prosecution for assault with a deadly weapon on a public official by not submitting to the jury the lesser included offense of assault on a government official. Defendant struck an officer with her truck as

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the officer stood beside his patrol car, but there was a lack of significant injury to the officer or damage to the patrol car and a jury could conclude that the truck was not likely to produce death or great bodily harm under the circumstances of its use.

**2. Constitutional Law— speedy trial—record ambiguous**

The question of whether defendant was denied a speedy trial was remanded for an evidentiary hearing where the record was insufficient both on whether the issue was properly presented at trial and whether the factors in *Barker v. Wingo*, 407 U.S. 514, were satisfied.

Appeal by defendant from judgment entered 27 August 2008 by Judge James W. Morgan in Cleveland County Superior Court. Heard in the Court of Appeals 10 June 2009.

*Attorney General Roy Cooper, by Assistant Attorney General Tawanda Foster-Williams, for the State.*

*Richard Croutharmel for defendant-appellant.*

GEER, Judge.

Defendant Martina Elizabeth Clark appeals from her convictions of (1) assault with a deadly weapon on a government official and (2) felony hit and run failure to stop with personal injury. We agree with defendant that the trial court committed plain error with respect to the assault charge in failing to instruct on the lesser included offense of misdemeanor assault on a government official. We, therefore, order a new trial on the assault charge.

With respect to both charges, defendant contends that she was denied her right to a speedy trial. Although we have carefully reviewed the record, we find the record ambiguous on the question whether defendant properly presented this issue to the trial court and, assuming that it was preserved, the record is inadequate to address the issue. We, therefore, remand for a determination whether defendant sufficiently presented her speedy trial objection to the trial court and, if so, for an evidentiary hearing to consider the factors set out in *Barker v. Wingo*, 407 U.S. 514, 33 L. Ed. 2d 101, 92 S. Ct. 2182 (1972).

**Facts**

The State presented evidence tending to show the following facts. Patrol Sergeant Victor Haynes was on duty with the Shelby

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Police Department on 26 July 2003. At approximately 5:30 p.m., he saw a dog fall off the back of a truck, landing in the middle of a busy street. Sergeant Haynes pulled his car over with his blue lights flashing and took the dog back to his patrol car.

While standing at his car with the rear door open trying to get the dog into the back of his vehicle, Sergeant Haynes heard an engine racing. Soon after, defendant struck Sergeant Haynes with her pick-up truck. The truck pushed Sergeant Haynes against the back of the patrol car, and the mirror or another object on the side of defendant's truck hit his elbow and back side. Sergeant Haynes slapped the back of the vehicle, trying to get defendant's attention. Sergeant Haynes experienced pain in his elbow.

Defendant continued to drive up the street and eventually backed into a driveway further down the road, still within Sergeant Haynes' view. Sergeant Haynes returned the dog to its owner and then proceeded up Monroe Street to where the truck was parked. When he approached defendant, she was angry and refused to give him her driver's license. When other officers arrived at the scene, defendant was yelling about a prior incident in which she had reported that her car was stolen, but Sergeant Haynes had determined that the car had actually been repossessed. When asked why she struck Sergeant Haynes with her truck, she responded by asking why he was not lying in the road or going to the hospital if he had been hit.

On 13 October 2003, a Cleveland County grand jury indicted defendant for (1) assault with a deadly weapon on a government official and (2) felony hit and run failure to stop with personal injury. Defendant waived her right to counsel and proceeded *pro se*. Defendant filed motions to dismiss on 30 December 2003, 10 February 2004, and 7 October 2004. The 7 October 2004 motion alleged a denial of defendant's right to a speedy trial.

The State then set the case for trial during the week of 8 November 2004. On 9 November 2004, the trial court called the case for trial. Although defendant asked to be heard on her motion to dismiss for violation of her right to a speedy trial, she also requested a continuance on the grounds that she had not received adequate notice of the trial date.

In an order dated 10 November 2004, the trial court denied defendant's 7 October 2004 motion to dismiss. The trial court concluded that the one-year delay was sufficiently long enough to require consideration of the *Barker* factors. The court then concluded that

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defendant had not shown that the delay was the result of neglect or willfulness of the prosecution. According to the court, the court file did “not show anything except normal administrative delay in processing and bringing a felony case to trial.” The trial court further found that although defendant had made a motion to dismiss on speedy trial grounds, she had also sought a continuance and, therefore, her demand for a speedy trial did not support dismissal. Finally, the trial court found that defendant had not been prejudiced by the delay since she had not suffered oppressive pretrial incarceration, and her defense had not been impaired.

On 17 November 2004, defendant purported to give notice of appeal “[p]ursuant to North Carolina-Appellant Rule 21(a)(1)” of the trial court’s decision to deny her motion to dismiss. This Court deemed that notice to be a petition for writ of certiorari and denied the petition on 11 January 2005.

The record contains no indication of what, if anything, took place in the trial court regarding the charges between 11 November 2004 and 11 August 2006, when defendant filed another motion to dismiss, again claiming a denial of her right to a speedy trial. In the alternative, defendant requested a continuance and the appointment of standby counsel. The record does not contain any ruling on this motion prior to the actual trial.

On 6 October 2006, defendant was arrested for failure to appear. On 9 October 2006, defendant filed a handwritten letter requesting to be released from jail that the trial court treated as a habeas corpus motion. On 16 October 2006, the trial court conducted a habeas corpus hearing and found that defendant should not have been arrested for failure to appear. The trial court ordered defendant’s release from jail following the hearing.

The record is silent as to what occurred in the trial court between October 2006 and 26 August 2008, when the case finally was tried. At the start of the trial, defendant handed some documents to the trial judge asking him to address, among other issues, her motion to dismiss. The record does not clearly indicate whether this motion to dismiss was the motion filed in August 2006 or, if not, what issues the motion raised. The trial court only stated: “Ms. Clark has handed me some concerns that she had and a number of reasons for a dismissal. I would say that I will address those that I could address prior to trial. These—all of these issues have been put before me before and [I] would DENY those motions to dismiss . . . .”

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On 27 August 2008, defendant was found guilty of both assault with a deadly weapon on a government official and felony hit and run failure to stop with personal injury. The trial court sentenced defendant to a presumptive-range sentence of 13 to 16 months imprisonment. Defendant timely appealed to this Court.

## I

[1] With respect to the conviction of assault with a deadly weapon on a government official, defendant contends that the trial court committed plain error in failing to instruct the jury on the lesser included offense of misdemeanor assault on a government official. “An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater.” *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002). “When determining whether there is sufficient evidence for submission of a lesser included offense to the jury, we view the evidence in the light most favorable to the defendant.” *State v. Ryder*, 196 N.C. App. 56, 64, 674 S.E.2d 805, 811 (2009).

Because defendant did not request this instruction at trial, we review the issue for plain error. As the Supreme Court has explained:

“[T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where [the error] is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury’s finding that the defendant was guilty.”

*State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (internal quotation marks omitted) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513, 103 S. Ct. 381 (1982)).

Here, when the trial court instructed the jury on the charge of assault with a deadly weapon on a government official, it instructed the jury that it was required to determine if the automobile used in

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the incident constituted a deadly weapon. Thus, the trial court necessarily concluded that the jury could, based on the evidence, conclude that the truck was not a dangerous weapon.

In *State v. Smith*, 186 N.C. App. 57, 650 S.E.2d 29 (2007), this Court addressed a similar situation. In *Smith*, the defendant had been charged with and convicted of assault with a deadly weapon on a government official. In addressing the defendant's argument that the trial court should have instructed the jury on the lesser included offense of misdemeanor assault on a government official, this Court stated initially: "[D]efendant argues that a trial court must submit the lesser-included offense of misdemeanor assault on a government official to the jury unless the court determines as a matter of law that the defendant did use a deadly weapon. We agree." *Id.* at 65, 650 S.E.2d at 35.

The Court noted that it had, previously in the opinion, held that the trial court had properly sent to the jury the question whether defendant's hands and the water in a river were deadly weapons when the State's evidence indicated that the defendant pushed an officer into the river and held his head underwater for 30 to 40 seconds. *Id.* at 64, 650 S.E.2d at 34. The Court then held that because the existence of a deadly weapon was a question for the jury, the jury, if instructed, could have concluded that the defendant did not use a deadly weapon and was only guilty of assault on a government official: "Having held that the trial court properly submitted to the jury the question of whether defendant's use of 'hands and water' was the use of a 'deadly weapon,' we further hold that the trial court erred by refusing to submit to the jury the lesser-included offense of misdemeanor assault on a government official." *Id.* at 66, 650 S.E.2d at 35-36.

Based on *Smith*, since the trial court, in this case, did not conclude that the truck was, as a matter of law, a deadly weapon, but rather left the question to be decided by the jury, the trial court should have instructed the jury on the lesser included offense of assault on a government official. The State does not dispute this analysis, but argues that any error was harmless because "[g]iven the speed and manner in which [defendant's truck] was used . . . it is a deadly weapon as a matter of law." Consequently, according to the State, the trial court should not have submitted to the jury the question whether the truck was used as a deadly weapon, and, therefore, no instruction on a lesser included offense was warranted.

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In *State v. Batchelor*, 167 N.C. App. 797, 800, 606 S.E.2d 422, 424 (2005), this Court accepted the same argument made by the State in this case. In deciding whether the trial court should have submitted to the jury the lesser included offense of assault on a government official, the Court first noted that the question depended on whether the car involved in that case was considered a deadly weapon as a matter of law. *Id.* at 799-800, 606 S.E.2d at 424. If so, then the lesser included offense “‘need not have been submitted.’” *Id.* at 800, 606 S.E.2d at 424 (quoting *State v. Palmer*, 293 N.C. 633, 642, 239 S.E.2d 406, 412 (1977)). The Court defined the question on appeal as “whether or not an automobile driven at a high speed is a deadly weapon as a matter of law” and concluded “that it is.” *Id.*

The Court pointed out that a deadly weapon is “[a]ny instrument which is likely to produce death or great bodily harm, under the circumstances of its use.” *Id.* (quoting *State v. Smith*, 187 N.C. 469, 470, 121 S.E. 737, 737 (1924)). The Court asserted that “[t]he key element in determining whether or not a weapon is deadly per se is the manner of its use . . . .” *Id.* Thus, “[t]he deadly character of the weapon depends sometimes more upon the manner of its use, and the condition of the person assaulted, than upon the intrinsic character of the weapon itself.” *Id.* (quoting *Smith*, 187 N.C. at 470, 121 S.E. at 737). An instrument is a deadly weapon as a matter of law only “‘[w]here the alleged deadly weapon and the manner of its use are of such character as to admit of but one conclusion . . . .’” *Id.* (quoting *Smith*, 187 N.C. at 470, 121 S.E. at 737). On the other hand, “‘where [the weapon] may or may not be likely to produce fatal results, according to the manner of its use[,] . . . its alleged deadly character is one of fact to be determined by the jury.’” *Id.* (quoting *Smith*, 187 N.C. at 470, 121 S.E. at 737).

In applying this test to the car at issue in *Batchelor*, this Court observed that “[a] car sitting idle may not be deadly,” but concluded that the manner of the use of the car by the defendant in that case “clearly put the officers in danger of death or great bodily harm. The evidence showed that defendant drove his car directly towards Deputy Wiggins who was standing in the driveway, and defendant drove at a high rate of speed directly at the officers’ vehicles in their lane of travel. Two cars had to take evasive action to avoid a head-on collision with defendant, and defendant crashed into the third car with the officer in it.” *Id.* The Court concluded that this “evidence . . . leads to ‘but one conclusion,’ which is the deadly nature of defendant’s use of the car,” and, therefore, the trial court did not err

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in not submitting to the jury the lesser charge of assault on a government official. *Id.*

In this case, we cannot conclude that the evidence leads to only one conclusion. Sergeant Haynes testified:

Like I said, [as] I was trying to get the dog around the door into the car, I heard an engine racing. At that point, I looked and I saw a car—saw the tires of a vehicle moving right up against me. As I went to stand up, the vehicle struck me and pushed me against the back of the patrol car and the mirror or the object on the side of the car actually hit me on my elbow and the back side and pushed me up against my vehicle. And as I came off the car, I slapped the back of the vehicle, trying to get the driver's attention.

As a result of this incident, Sergeant Haynes did not sustain any injuries requiring immediate medical attention. He did experience pain in his elbow where he was struck by the truck's mirror or another object on the truck. There was no evidence of any damage to the patrol car.

Thus, although the truck was not sitting idle, there was no evidence that it was moving at a high rate of speed. Sergeant Haynes never testified regarding how fast the truck was going. The State argues, however, that "[t]he sound of the engine racing would indicate the car was traveling at a high rate of speed when it hit Sergeant Haynes." A jury would not, however, necessarily draw that inference, since the sound could simply indicate that defendant was revving the motor. Indeed, the fact that Sergeant Haynes could slap the back of the truck as it went by would permit a jury to infer that the truck actually was not traveling very fast.

The State also points to Sergeant Haynes' testimony that he was pushed by the truck into the patrol car and was injured. The jury, however, could take into account the lack of serious injury to Sergeant Haynes resulting from his contact with defendant's vehicle. Based on that testimony, the officer was not hurt when pushed into the patrol car, allowing the finding that the truck did not impact him very hard. Instead, he only had pain in his elbow from being struck by the mirror or other object extending from the truck as it passed by. Given the lack of significant injury to Sergeant Haynes, the lack of any evidence of damage to the patrol car, and the fact that an object extending from the truck struck the officer's elbow, a jury could con-

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clude that the truck was not aimed directly at the officer and the impact was more of a glancing contact.

The State's argument that the manner in which defendant drove the truck necessarily placed Sergeant Haynes in great danger of death or serious injury would require us to draw inferences from the evidence in favor of the State. In order, however, to decide whether the deadly weapon issue should have been presented to the jury or decided as a matter of law, the evidence must be viewed in the light most favorable to defendant—and not to the State.

Accordingly, we hold that given the evidence presented at trial, although a jury could find that the truck was used as a deadly weapon, it could also find that the truck was not “‘likely to produce death or great bodily harm, under the circumstances of its use.’” *Id.* (quoting *Smith*, 187 N.C. at 470, 121 S.E. at 737). The trial court, therefore, erred in failing to submit to the jury the lesser included offense of assault on a government official.

We must, however, still determine whether the error was sufficiently prejudicial to constitute plain error. In arguing that it was not, the State simply asserts that “[t]he jury could only find from these facts [that] the car was used as a deadly weapon . . . .” We have already rejected this view of the evidence. We believe, given the nature of the evidence, that defendant has made a sufficient showing of plain error. *See State v. Collins*, 334 N.C. 54, 62-63, 431 S.E.2d 188, 193 (1993) (holding that trial court committed plain error when it failed to provide jury with instruction on lesser included offense of attempted murder); *State v. Carter*, 177 N.C. App. 539, 543-44, 629 S.E.2d 332, 336 (holding that trial court committed plain error “in failing to instruct the jury on the [lesser included] offense of conspiracy to commit common law robbery, and in doing so the trial court improperly limited the jury’s consideration of the offenses which defendant could be found guilty of”), *aff’d per curiam*, 361 N.C. 108, 637 S.E.2d 537 (2006); *State v. Lowe*, 150 N.C. App. 682, 687, 564 S.E.2d 313, 316 (2002) (holding that it was plain error for trial court not to instruct on lesser included offense of misdemeanor assault inflicting serious injury). We, therefore, reverse defendant’s conviction and order a new trial.

## II

[2] Defendant argues with respect to both of her convictions that she has been denied her right to a speedy trial under the Sixth

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Amendment to the United States Constitution and Article I, Section 18 of the North Carolina Constitution and is entitled, therefore, to have the charges against her dismissed. As this Court has explained:

The right of every person formally accused of a crime to a speedy and impartial trial is secured by the fundamental law of this State, *State v. Hollars*, 266 N.C. 45, 145 S.E. 2d 309 (1965), and guaranteed by the Sixth Amendment to the federal constitution, made applicable to the states by the Fourteenth Amendment. *Klopfer v. North Carolina*, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed. 2d 1 (1967); *State v. McKoy*, 294 N.C. 134, 240 S.E. 2d 383 (1978). In determining whether an accused has been denied his right to a speedy trial, the courts have weighed four factors: (1) the length of the delay, (2) the cause of the delay, (3) waiver by the defendant, and (4) prejudice to the defendant. *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed. 2d 101 (1972); *State v. McKoy, supra*; *State v. Wright*, 290 N.C. 45, 224 S.E. 2d 624 (1976). Whether a speedy trial has been afforded depends on the circumstances of each particular case, and the burden is on the defendant who asserts denial of a speedy trial to show that the delay was due to the neglect or willfulness of the prosecution.

*State v. Branch*, 41 N.C. App. 80, 85, 254 S.E.2d 255, 259, *appeal dismissed*, 297 N.C. 612, 257 S.E.2d 220 (1979).

“Thus the defendant is required to show that the unreasonable delay in his trial was caused by the neglect or wilfulness of the prosecution, as the Constitution does not outlaw good-faith delays which are reasonably necessary for the State to prepare and present its case.” *State v. Chaplin*, 122 N.C. App. 659, 663, 471 S.E.2d 653, 655 (1996) (internal quotation marks omitted). Nevertheless, “[a] showing of a particularly lengthy delay establishes a *prima facie* case that the delay was due to the neglect or wilfulness of the prosecution and requires the State to offer evidence fully explaining the reasons for the delay and sufficient to rebut the *prima facie* showing.” *Id.*, 471 S.E.2d at 655-56 (internal quotation marks omitted).

In ruling on a motion to dismiss for denial of the right to a speedy trial, “the trial court is not always required to conduct an evidentiary hearing and make findings of facts and conclusions of law.” *Id.*, 471 S.E.2d at 656. When, however, the motion to dismiss is “based on allegations not ‘conjectural and conclusory [in] nature,’ an evidentiary hearing is required and the trial court must enter findings to resolve any factual disputes and make conclusions in support of its

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order.” *Id.* (quoting *State v. Dietz*, 289 N.C. 488, 495, 223 S.E.2d 357, 362 (1976)).

In *State v. Roberts*, 18 N.C. App. 388, 389, 197 S.E.2d 54, 55, *cert. denied*, 283 N.C. 758, 198 S.E.2d 728 (1973), the defendant’s case went to trial 13 months after the indictment. On the first day of trial, the defendant moved to dismiss for lack of a speedy trial. The trial court summarily denied the motion without allowing oral argument. This Court first observed: “From the record before us, it is impossible to tell whether the State caused the delay of a year in getting defendant’s case to trial; and, if so, whether such delay was justified. It is likewise impossible to tell whether the delay was caused by defendant’s conduct. Also, it is impossible to determine whether prejudice has resulted to defendant from the delay.” *Id.* at 391, 197 S.E.2d at 56. The Court stressed that while a trial court is not required to hold an evidentiary hearing in every instance that a defendant claims denial of a speedy trial, “where the record shows a substantial delay and does not show the cause therefor, the trial judge should hold a sufficient hearing to allow him to determine the facts and balance the equities in accordance with *Barker v. Wingo* . . . .” *Id.*, 197 S.E.2d at 57.

The Court then remanded the case to the trial court for an evidentiary hearing on the question of the delay between the defendant’s indictment and the trial. *Id.* at 392, 197 S.E.2d at 57. The Court directed that “[i]f the presiding judge determines that defendant’s constitutional right to a speedy trial has been denied, he shall find the facts and enter an order vacating judgment, setting aside the verdict, and dismissing the indictment. If the presiding judge determines that defendant’s constitutional right to a speedy trial has not been denied, he shall find the facts and enter an order denying the defendant’s motion to dismiss, and order commitment to issue in accordance with the [original] judgment . . . .” *Id.* at 392-93, 197 S.E.2d at 57.

We think *Roberts* controls in this case if one of the motions to dismiss considered by the trial court on the first day of trial was based on defendant’s speedy trial rights. Assuming, without deciding, that that is the case, then the record establishes that although defendant was indicted in October 2003, she was not tried until August 2008. Although the trial court denied a motion to dismiss for lack of a speedy trial on 9 November 2004, having made appropriate findings of fact and conclusions of law, an additional delay of almost four years then occurred. We can find no explanation for this delay in the record. While the record mentions some events that occurred in 2006, nothing explains why no trial occurred. Even the State acknowledges

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that “[t]he record is unclear on what happened in the trial court between November 13, 2006 and August 26, 2008.”

Consistent with *Chaplin* and *Roberts*, we believe that this delay is sufficient to warrant an evidentiary hearing. See *State v. Strickland*, 153 N.C. App. 581, 586, 570 S.E.2d 898, 903 (2002) (holding that 940 days between defendant’s arrest and trial was sufficient to establish *prima facie* that delay was caused by prosecutorial negligence), *cert. denied*, 357 N.C. 65, 578 S.E.2d 594 (2003), *cert. dismissed*, 602 S.E.2d 679 (2004); *State v. Pippin*, 72 N.C. App. 387, 392, 324 S.E.2d 900, 904 (1985) (holding that 14-month delay in bringing defendant to trial “was *prima facie* unreasonable and required the district attorney to fully justify the delay”), *disc. review denied*, 313 N.C. 609, 330 S.E.2d 615 (1985); *Branch*, 41 N.C. App. at 86, 254 S.E.2d at 259 (holding that “once the defendant showed a seventeen month delay after his request for a speedy trial, the State should have presented evidence fully explaining the reasons for the delay”).

We, therefore, remand for an evidentiary hearing on the issue of defendant’s right to a speedy trial. As an initial matter, the trial court must determine (1) whether defendant moved to dismiss on that basis at the trial, and (2) if not, whether defendant’s filing of the motion on 11 August 2006 was sufficient to raise the issue. In the event that the trial court determines that the issue was properly raised by defendant in the trial court, then the court must conduct a hearing sufficient to make findings of fact and conclusions of law in accordance with *Barker*.

Although we have held that defendant is entitled to a new trial on the charge of assault with a deadly weapon on a government official, this evidentiary hearing should be conducted first. As in *Roberts*, if the trial court determines that defendant’s right to a speedy trial was violated, then the court “shall find the facts and enter an order vacating judgment, setting aside the verdict, and dismissing the indictment[s]” as to both charges. *Roberts*, 18 N.C. App. at 392, 197 S.E.2d at 57. If, on the other hand, the trial court concludes that no violation of the right to a speedy trial occurred, the trial court shall, after entering an appropriate order, proceed to trial on the charge of assault with a deadly weapon on a government official. The conviction for felony hit and run failure to stop with personal injury shall stand. Since, however, the trial court consolidated the convictions for purposes of sentencing, the trial court would need to resentence defendant on the felony hit and run conviction.

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New trial in part; remanded with instructions in part.

Judges ROBERT C. HUNTER and STEELMAN concur.

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STATE OF NORTH CAROLINA v. DONNA MARIE SMALL, DEFENDANT

No. COA09-222

(Filed 8 December 2009)

**1. Discovery— victim’s undisclosed statement to prosecutors—no new information**

The trial court did not abuse its discretion by denying defendant’s motion to dismiss or exclude a victim’s statement to prosecutors where that statement was not disclosed to defendant. There was nothing significantly new or different in the undisclosed statement; the only difference from the other, disclosed information was that the victim could not remember speaking to officers on the night of the shooting.

**2. Appeal and Error— preservation of issues—instructions—objection at trial**

The issue of a transferred intent instruction was preserved for appellate review where the State contended that defense counsel had objected to a different instruction, but it was clear from the record that the trial court was aware that defendant had objected to the transferred intent instruction and considered the two issues separately.

**3. Firearms and Other Weapons— discharge into occupied building**

Although defendant contended that inclusion of a transferred intent instruction was error in a prosecution for assault and discharging a firearm into occupied property, the instructions accurately conveyed the elements of the offense and comported with the evidence. Defendant intentionally fired a shotgun at the victim, hitting both the victim and a house defendant knew to be occupied.

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**4. Firearms and Other Weapons— discharge into occupied property—muzzle velocity**

The trial court did not err by failing to dismiss the charge of discharging a firearm into occupied property for insufficient evidence that the shotgun met the velocity requirements of N.C.G.S. § 14-34.1(a). There are two categories of weapons covered by the statute: firearms and other barreled weapons. The plain language of the statute, legislative intent, and precedent indicate that the minimum muzzle velocity requirement applies to “other barreled weapons” and not to firearms in general.

Appeal by defendant from judgments entered 9 July 2008 by Judge Vance B. Long in Davidson County Superior Court. Heard in the Court of Appeals 14 September 2009.

*Attorney General Roy A. Cooper, III, by Assistant Attorney General Karen A. Blum, for the State.*

*Mercedes O. Chut for defendant-appellant.*

HUNTER, Robert C., Judge.

Donna Marie Small (“defendant”) appeals from felony convictions for discharging a firearm into occupied property and assault with a deadly weapon inflicting serious injury. After careful review, we find no error.

Background

The evidence at trial tended to show that on 1 September 2006, Arthur Lee Hunt, Jr. (“Hunt”) and his girlfriend, Wanda Small (“Wanda”), decided to spend the night at the home of Dennis Russell (“Russell”). Hunt is defendant’s ex-boyfriend, and Wanda is defendant’s sister. Also present in the home were Russell’s wife and three children.

On 2 September 2006 between 2:30 a.m. and 3:00 a.m., Russell was awakened by a ringing telephone, which he did not answer. At that time, Russell noticed a vehicle in front of the house, and upon investigation, he saw someone disturbing Hunt’s motorcycle. He then saw the same person retrieve a knife and shotgun out of a nearby car. Russell proceeded to awaken Hunt and tell him that someone was “messing with his bike.” Russell then went to get his gun and call 911 as Hunt exited the front door.

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From inside the house, Russell heard a shotgun blast, and Hunt immediately reappeared, yelling that defendant shot him. Russell saw defendant standing at the front door holding the shotgun, yelling: “Send Snoop<sup>1</sup> back out here so I can finish what I came for.” Russell testified that he held defendant at gunpoint until the police arrived and arrested her. At the Thomasville Police Department, defendant signed a written statement before Officer Jason Annas (“Officer Annas”) in which she admitted to shooting Hunt.

It was later determined in the emergency room that Hunt had been shot in the arm, shattering the bone, an injury which required a hospital stay of over a week. After arresting defendant, officers observed one broken window and pellet holes in the siding of Russell’s house.

Defendant was indicted on one count of discharging a firearm into occupied property and one count of assault with a deadly weapon inflicting serious injury. Prior to trial, defendant made a motion to dismiss all charges, alleging that the State failed to comply with North Carolina’s discovery procedures by not disclosing statements made by Wanda and Hunt to members of the district attorney’s office. The court denied defendant’s motion, but ordered the State to proffer Hunt’s testimony outside the presence of the jury to enable the court to determine whether a discovery violation had occurred. After considering the State’s proffer and arguments of counsel, the court denied defendant’s renewed motion to dismiss. Defendant then made a motion *in limine* to exclude Hunt’s testimony, which was also denied.

On 9 July 2008, defendant was convicted by a jury of both charges. She was sentenced to two consecutive sentences of 25 to 39 months imprisonment.

Analysis

## I.

[1] Defendant first argues that the trial court erred in denying her motion to dismiss and motion *in limine* on the grounds that the State failed to comply with N.C. Gen. Stat. § 15A-903(a)(1) (2007) by not disclosing to defendant Hunt’s pre-trial statement to the prosecution. Specifically, defendant claims that Hunt told the prosecution that he did not remember giving a statement to police on the night of the

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1. Snoop is a nickname for Arthur Hunt.

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shooting, but the officer's report, which was disclosed to defendant, contained a statement made by Hunt to the officer.

The purpose of our discovery statutes is "to protect the defendant from unfair surprise." *State v. Tucker*, 329 N.C. 709, 716, 407 S.E.2d 805, 809-10 (1991). "Whether a party has complied with discovery and what sanctions, if any, should be imposed are questions addressed to the sound discretion of the trial court." *Id.* at 716, 407 S.E.2d at 810. "[The] discretionary rulings of the trial court will not be disturbed on the issue of failure to make discovery absent a showing of bad faith by the state in its noncompliance with the discovery requirements." *State v. McClintick*, 315 N.C. 649, 662, 340 S.E.2d 41, 49 (1986). "[O]nce a party, or the State has provided discovery there is a continuing duty to provide discovery and disclosure." *State v. Blankenship*, 178 N.C. App. 351, 354, 631 S.E.2d 208, 210 (2006).

N.C. Gen. Stat. § 15A-903(a)(1) provides that, upon defendant's motion, the court must order the State to make available to the defense, *inter alia*, all witness statements and investigating officers' notes. In addition, any oral statements made by a witness to a prosecuting attorney outside the presence of a law enforcement officer must be provided in writing or in recorded form if there is "significantly new or different information in the oral statement from a prior statement made by the witness." *Id.*

During the trial court's inquiry into the alleged discovery violation, the State presented Officer Annas's report, which provided in part that "Mr. Hunt was coherent and also stated that Ms. Donna Marie Small shot him." The State provided this report to defendant during discovery. Upon *voir dire* examination, Hunt testified as follows:

Q. And could you see in what position your bike was in?

A. It was upright, and she was standing beside of it.

Q. And by "she," who do you mean, sir?

A. Donna Small.

Q. And what happened after you saw Ms. Small?

A. She said, "Come here, I want to talk to you."

Q. Okay. And what did you do after that?

. . . .

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A. I went in and put my shoes on, and as I was coming back out the door, I shut the door 'cause I didn't want nobody to hear us arguing, and when I shut the door—when I turned around, I seen a barrel pointing at me, and I didn't say anything.

Q. After Ms. Small pointed the gun at you, what happened next?

A. Well, as I was closing the door, I seen a barrel pointing at me. So I didn't say anything or do nothing, I just took a jump, and pow.

Q. Took a what? Took a jump?

A. Took a leap. And when I did, my arm goes out like this, and pow, blew it right behind me.

Q. Where did you leap to, sir?

A. I jumped—tried to jump between the brick column. I didn't make it, so I stood back up and I ran in the house and told my cousin to call the ambulance, that Donna Small shot me.

Hunt then testified regarding a pre-trial interview between himself and prosecutor Wendy Terry (“Terry”), which defendant claimed was never provided to her during discovery:

Q. And you said you have no remembrance of talking to any officer?

A. I was shocked. I don't remember what got there first, the ambulance or a police officer.

Q. Do you remember ever talking to a police officer?

A. No. All I remember is the ambulance.

Based on the foregoing, the trial court made the following findings of fact and conclusions of law:

[T]he Court finds that the alleged victim in this matter issued a statement to the initial investigating officer, which is contained in an incident investigation report with an addendum or attachment entitled, “Reporting Officer Narrative,” which reads in part as follows: “Mr. Hunt was coherent and also stated Ms. Donna Marie Small shot him.”

....

The Court further finds that this statement made to the officer constitutes a prior statement under N.C.G.S. § 15A-903(a)(1), and

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that while the alleged victim's proffer of testimony does offer contextual details not included in the prior statement, *that the testimony does not constitute a significantly new or different statement from the prior statement given to the officers.*

....

The Court finds and concludes that this statement was disclosed to the defendant in discovery. The Court finds that, further, the defendant has provided a Mirandized statement, according to the discovery to the officers, wherein she admits to shooting the alleged victim.

(Emphasis Added.)

Ultimately the trial court concluded that the pre-trial statement made to Terry did not offer any significantly new or different information from what had already been provided in prior discovery disclosures and therefore no discovery violation had occurred.

Hunt testified during *voir dire* that defendant shot him, which is precisely the same information conveyed to Officer Annas and included in the officer's report, which was disclosed to defendant. Further, the assertion that defendant shot Hunt was contained in other witness statements and that of defendant herself. Nothing in the record indicates that Hunt at any point made a statement to prosecutors contradicting or in any way altering his statement that he was shot by defendant. The only divergence in Hunt's oral pre-trial statement to the State was that he did not remember speaking with officers on the night of the shooting. However, Hunt's account of the actual incident remained consistent.

In sum, Hunt's statement that he could not remember giving a statement to the police does not constitute any unfair surprise to defendant; rather, Hunt's proffered testimony comports with his earlier statement that defendant shot him. Therefore, although Hunt did make a subsequent statement to prosecutors, since it did not contain significantly new or different information from his prior statement, the State was under no duty to disclose the second statement. Accordingly, we find no abuse of discretion in the trial court's denial of defendant's motion to dismiss the charges or denial of her motion *in limine*.

## II.

Defendant next contends that the trial court erred by providing a jury instruction on transferred intent. The State opposes considera-

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tion of this issue on the ground that defendant failed to object to the instruction at trial. “Where a defendant fails to make a proper objection at trial, he waives the issue on appeal, absent a finding of plain error.” *State v. Ferebee*, 177 N.C. App. 785, 789, 630 S.E.2d 460, 463 (2006) (citations omitted).

## A. Preservation of Issue

**[2]** The discussion of transferred intent first arose during defendant’s motion to dismiss the charge of discharging a firearm into occupied property. In arguing that the State had presented sufficient evidence of intent as to that charge, the prosecutor cited *State v. Fletcher*, 125 N.C. App. 505, 481 S.E.2d 418, *disc. review denied*, 346 N.C. 285, 487 S.E.2d 560, *cert. denied*, 522 U.S. 957, 118 S. Ct. 383, 139 L. Ed. 2d 299 (1997), and explained that

[i]n that case, the court upheld the trial court’s use of the doctrine of transferred intent to satisfy the intent element of the crime of discharging a firearm into an occupied residence where the evidence tended to show the defendant intended to shoot a person, but instead shot into an occupied residence.

The trial court then ruled that “defendant’s motion to dismiss the charge of firing into an occupied dwelling at the close of all of the evidence is denied on the basis of 125 N.C. App. 505.” At that point, the judge indicated his intent to include a transferred intent charge by stating: “I’m not sure how transferred intent is crafted by that trial judge, but they clearly upheld it.” When asked if he had anything further, defense counsel stated: “Please Your Honor to each of the court’s findings of fact, conclusions of law and rulings, the defendant respectfully excepts, respectfully objects and excepts.”

After recalling the jury for defendant to rest, the court proposed delivery of a jury charge that included incorporation of the transferred intent charge within the substantive charge of discharging a firearm into occupied property. After additional discussion regarding the submission of lesser-included offenses and proposed instructions by defense counsel, the court began addressing defendant’s objections to the State’s second proposed instruction, an expansion of the substantive charge of discharging a firearm into occupied property to include a definition of willful and wanton. Subsequently, the court stated:

I will then, over the defendant’s objections, include the special instruction requested by the [State] as to transferred intent to

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read as follows: If you find that the defendant, Donna Marie Small, intended to shoot Arthur Lee Hunt, Junior, and in doing so discharged a weapon into 9 Park Street, Thomasville, North Carolina, then you may infer that Donna Marie Small willfully, wantonly and intentionally shot into 9 Park Street, Thomasville, North Carolina.

The State contends that the trial court mis-spoke in stating that defense counsel had objected to the transferred intent instruction, when in actuality, he had objected to the definition of willful and wanton. However, it is significant that immediately after ruling on the transferred intent instruction, the trial court stated, “I don’t think, guys, I don’t know that we need—could you guys expand a little bit more why you think we need to define wanton for the jury?” Shortly thereafter, the court “sustain[ed] the defendant’s objection to including an expanded definition in the jury instructions themselves.” Thus, it is clear from the record that the trial court considered these two issues separately and was cognizant from all previous discussions that defendant objected to the transferred intent instruction and the instruction that defined willful and wanton.

A complete review of the record indicates that defendant excepted to both proposed instructions. This showing, in combination with the trial court’s clear perception that defendant specifically objected to the transferred intent portion of the charge, is sufficient for this Court to review defendant’s assignment of error.

## B. Jury Instruction—Transferred Intent

**[3]** When evaluating a challenge to a jury instruction, this Court must determine whether the trial court “instruct[ed] the jury on the law arising on the evidence.” *State v. Bogle*, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989). “Failure to instruct upon all substantive or material features of the crime charged is error.” *Id.*; accord *State v. Lanier*, 165 N.C. App. 337, 354, 598 S.E.2d 596, 607 (2004) (stating that “[f]ailure to instruct on each element of [the] crime is prejudicial error requiring a new trial”). Therefore, we must determine whether incorporation of the transferred intent instruction properly conveyed to the jury the elements of discharging a weapon into occupied property.

According to our Supreme Court, discharging a firearm into occupied property is defined as “intentionally, without legal justification or excuse, discharg[ing] a firearm into an occupied building with

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knowledge that the building is then occupied by one or more persons or when he has reasonable grounds to believe that the building might be occupied by one or more persons.” *State v. Williams*, 284 N.C. 67, 73, 199 S.E.2d 409, 412 (1973) (emphasis omitted); N.C. Gen. Stat. § 14-34.1 (2007). Defendant contends that inclusion of the transferred intent instruction inaccurately informed the jury of these elements.

Defendant cites *State v. James*, 342 N.C. 589, 466 S.E.2d 710 (1996), for the proposition that the statute requires proof that defendant knew the structure into which she shot was occupied. When instructing on the elements of this offense, the trial court instructed that the third element the State must prove was “that Donna Marie Small knew that 9 Park Street, Thomasville, North Carolina was occupied by one or more persons.” In the final mandate of that instruction the trial court stated:

If you find from the evidence beyond a reasonable doubt that on or about September 2, 2006, Donna Marie Small willfully or wantonly and intentionally discharged a firearm into 9 Park Street, Thomasville, North Carolina, while it was occupied, and that the defendant knew that it might be occupied, it would be your duty to return a verdict of guilty. If you do not so find or if you have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

It is clear from the record that the jury was properly instructed that the State was required to prove knowledge that the home was occupied before finding defendant guilty of this charge.

Defendant further argues that the doctrine of transferred intent may not be applied when a defendant is charged with a different crime than he or she apparently intended to commit, or if the crime charged is not a specific intent crime. Defendant cites *State v. Jordan*, 140 N.C. App. 594, 537 S.E.2d 843 (2000), for this proposition; however, defendant’s reliance on *Jordan* is misplaced.

In *Jordan*, this Court reversed the defendant’s conviction due to erroneous jury instructions because the trial court submitted “a logical impossibility for the jury’s consideration,” and also instructed in “an inherently inconsistent manner.” *Id.* at 596, 537 S.E.2d at 845. When instructing on second-degree murder, the trial judge described deliberation as a required element when, in fact, deliberation was not required. *Id.* Thus, this Court’s decision in *Jordan* was not a prohibition against utilizing the doctrine of transferred intent to satisfy the

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intent element of a different crime or a restriction of its use to only specific intent crimes; rather, *Jordan* narrowly held that the instructions in that case were misleading.

In contrast, this Court has expressly authorized the use of the transferred intent doctrine “to satisfy the intent element of discharging a firearm into occupied property, where the evidence tends to show that defendant intended to shoot a person, but instead shot into an occupied residence.” *Fletcher*, 125 N.C. App. at 513, 481 S.E.2d at 423. In *Fletcher*, the evidence showed that the defendant fired shots at the victim’s back as she attempted to flee. *Id.* at 508, 481 S.E.2d at 420. The victim sought refuge at a nearby residence. *Id.* When police arrived, the occupant of the residence identified several areas where bullets had penetrated the house. *Id.* This Court found no error in the trial court’s utilization of the transferred intent instruction to transfer the intent to shoot a particular person to the offense of discharging a firearm into the occupied property of another. *Id.* at 513, S.E.2d at 423. Rationale for this treatment is based on the fact that N.C. Gen. Stat. § 14-34.1, which prohibits discharging a weapon into occupied property, was “enacted for the protection of occupants of the premises” and is therefore “an offense against the person, and not against property.” *Id.*

In the case *sub judice*, the State presented evidence that defendant intentionally fired a weapon toward Hunt and that some projectiles penetrated the exterior of Russell’s home. Further, evidence was introduced showing that defendant knew persons other than Hunt were present inside the home. Nothing in the trial court’s instructions to the jury negated the requirement that the jury find: (1) an intentional discharge of the firearm; (2) into an occupied building; and (3) defendant had knowledge, or reasonable grounds for believing that the building was occupied at the time of the discharge.

Thus, the trial court’s substantive instructions on discharging a weapon into occupied property accurately conveyed the elements of the offense to the jury and comported with the evidence presented. The trial court, therefore, did not err in incorporating the transferred intent doctrine into the instruction for this offense.

## III.

[4] Finally, defendant argues that the trial court erred in failing to dismiss the charge of discharging a firearm into occupied property due to insufficiency of the evidence. Specifically, defendant argues that the State failed to present evidence that the firearm discharged

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by defendant met the requisite velocity specifications set forth in N.C. Gen. Stat. § 14-34.1(a). This argument is without merit.

A motion to dismiss due to insufficiency of the evidence is properly denied if the State has presented substantial evidence of each essential element of the offense charged and that the defendant is the perpetrator. *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455, *cert. denied*, 531 U.S. 890, 121 S. Ct. 213, 148 L. Ed. 150 (2000). Substantial evidence is that which a reasonable fact finder might find sufficient to support a conclusion. *State v. McLaurin*, 320 N.C. 143, 146, 357 S.E.2d 636, 638 (1987). The court “must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences.” *Fritsch*, 351 N.C. at 378-79, 526 S.E.2d at 455.

The applicable statute provides that:

Any person who willfully or wantonly discharges or attempts to discharge *any firearm or barreled weapon capable of discharging shot, bullets, pellets, or other missiles at a muzzle velocity of at least 600 feet per second* into any building, structure, vehicle, aircraft, watercraft, or other conveyance, device, equipment, erection, or enclosure while it is occupied is guilty of a Class E felony.

N.C. Gen. Stat. § 14-34.1(a) (emphasis added). A firearm is defined as “[a] handgun, shotgun, or rifle which expels a projectile by action of an explosion.” N.C. Gen. Stat. § 14-409.39(2) (2007).

Of particular relevance is the legislature’s use of the word “or” in N.C. Gen. Stat. § 14-34.1(a). This Court has held that “[w]here a statute contains two clauses which prescribe its applicability, and the clauses are connected by a disjunctive (e.g. ‘or’), the application of the statute is not limited to cases falling within both classes, but will apply to cases falling within either of them.” *State v. Conway*, — N.C. App. —, —, 669 S.E.2d 40, 43 (2008) (quoting *Grassy Creek Neighborhood Alliance, Inc. v. City of Winston-Salem*, 142 N.C. App. 290, 296, 542 S.E.2d 296, 300 (2001)). There are two categories of weapons covered by this statute; firearms and other barreled weapons. The question then becomes whether the descriptive phrase “capable of discharging shot, bullets, pellets, or other missiles at a muzzle velocity of at least 600 feet per second” refers only to “barreled weapons” or also applies to “any firearm.” Although this is a novel issue, the plain language of the statute, legislative intent, and previous treatment by North Carolina Courts indicate that the mini-

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mum muzzle velocity requirement applies only to “barreled weapons” and not to firearms in general.

“The primary rule of statutory construction is that the intent of the legislature controls the interpretation of a statute. To determine this intent, the courts should consider the language of the statute, the spirit of the act, and what the act seeks to accomplish.” *Tellado v. Ti-Caro Corp.*, 119 N.C. App. 529, 533, 459 S.E.2d 27, 30 (1995) (citation omitted).

The title of the statute at issue is “Discharging certain barreled weapons or a firearm into occupied property.” N.C. Gen. Stat. § 14-34.1. The most reasonable interpretation is that all firearms are implicated in the statute, but only certain barreled weapons are included—those with a muzzle velocity of at least 600 feet per second. Also, the intent of this statute is to protect occupants of the building. *Williams*, 284 N.C. at 72, 199 S.E.2d at 412. Thus, the most logical interpretation is that the General Assembly was primarily concerned with the use of traditional firearms to shoot into occupied property but further recognized the potential for individuals to use non-traditional barreled weapons for this same purpose. Therefore, the legislature included the traditional firearm in the statute, but further included other barreled weapons that have a propensity to penetrate a structure and injure occupants.

Additionally, a person is guilty of this felony if “he intentionally, without legal justification or excuse, discharges a firearm into an occupied building with knowledge that the building is then occupied by one or more persons or when he has reasonable grounds to believe that the building might be occupied by one or more persons.” *Williams*, 284 N.C. at 73, 199 S.E.2d at 412 (emphasis omitted). The jury was properly instructed as to these elements. Defendant fails to cite any cases, and we have found none, requiring presentation of evidence of muzzle velocity as part of the State’s *prima facie* case for this charge.

In sum, because there was substantial evidence to satisfy each element of the crime charged, and that defendant was the perpetrator, we conclude that the trial court did not err in denying defendant’s motion to dismiss.

### Conclusion

For the foregoing reasons, we hold that the trial court did not abuse its discretion when it determined that the State did not violate

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the discovery statutes; the trial court did not err in incorporating transferred intent into the jury instructions; and the trial court did not err in denying defendant's motion to dismiss the charge of discharging a firearm into occupied property.

No error.

Chief Judge MARTIN and Judge BRYANT concur.

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IN THE MATTER OF: APPEAL OF: IBM CREDIT CORPORATION FROM THE DECISION OF  
THE DURHAM COUNTY BOARD OF COUNTY COMMISSIONERS CONCERNING THE VALUATION OF  
BUSINESS PERSONAL PROPERTY FOR TAX YEAR 2001

No. COA08-1514

(Filed 8 December 2009)

**Taxation— property—valuation of leased computer equipment—depreciation—functional and economic obsolescence**

The Court of Appeals reversed the final decision of the Property Tax Commission regarding Durham County's valuation of 40,779 pieces of leased computer equipment for business personal property taxes in tax year 2001. The case was again remanded to the Commission for a reasoned decision with regard to what amount of depreciation should have been deducted from the valuation to account for functional and economic obsolescence due to market conditions.

Appeal by IBM Credit Corporation from Final Decision entered 29 August 2008 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 8 June 2009.

*Manning Fulton & Skinner, P.A., by Michael T. Medford and  
Judson A. Welborn, for taxpayer appellant.*

*Durham County Attorney S.C. Kitchen for County of Durham  
appellee.*

HUNTER, JR., Robert N., Judge.

IBM Credit Corporation ("IBM Credit") appeals from a final decision of the Property Tax Commission (the "Commission") upholding

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Durham County's valuation of 40,779 pieces of leased computer equipment for business personal property taxes in tax year 2001. This Court previously remanded this matter to the Commission for reconsideration because the Commission did not properly apply the burden of proof framework mandated by *In re Appeal of IBM Credit Corp.*, 186 N.C. App. 223, 650 S.E.2d 828 (2007), *aff'd*, 362 N.C. 228, 657 S.E.2d 355 (2008) [*IBM Credit I*]. We reverse and remand.

## FACTS

In *IBM Credit I*, we observed that IBM Credit timely filed its business personal property listings with the Durham County Tax Office for the tax year 2001. As of 1 January 2001, IBM Credit leased 40,779 pieces of computer and computer-related equipment to 364 customers in Durham County. The leasing process was structured so that IBM Credit's customers would negotiate a price for a particular piece of equipment with a vendor. This acquisition cost would be paid by IBM Credit to the vendor, and IBM Credit in turn would typically lease the equipment to the customer for a 24-, 36-, or 48-month term while charging interest on the acquisition costs and establishing a "residual value" for the equipment at the initiation of the lease.

To assess the value of IBM Credit's 40,779 pieces of computer and computer-related equipment, Durham County applied Schedule U5 of the 2001 Cost Index and Depreciation Schedules in the 2001 Durham County Business Personal Property Listing Forms. This manual was prepared by the North Carolina Department of Revenue to assist county tax appraisers in valuing business personal property. The transmittal memorandum accompanying these schedules contained the following paragraph regarding the schedule's proper use by county tax appraisers:

These schedules have been prepared by this office as a general guide to be used in the valuation of business personal property utilizing the replacement cost approach to value. It is important to remember that the schedules are only a guide. There will be situations where the appraiser may need to make adjustments for additional functional or economic obsolescence, or for other factors.

After Durham County's tax appraiser applied Schedule U5 without further adjustment to determine a value of \$144,277,140.00 for IBM Credit's equipment, IBM Credit appealed to the Durham County Board of County Commissioners requesting an adjustment for additional functional or economic obsolescence. Durham County made

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no adjustment, and a subsequent appeal was made to the Commission in which IBM Credit contended that the value of its equipment was only \$96,458,707.00. The Commission took extensive evidence, and affirmed Durham County's valuation of \$144,277,140.00.

IBM Credit then appealed to this Court, which reversed and remanded the matter to the Commission on the grounds that the Commission's prior order had failed to properly employ the burden of proof required in tax appraisal cases. *See IBM Credit I*, 186 N.C. App. 223, 650 S.E.2d 828. In that appeal, the burden-shifting analysis that the Commission was to follow on remand was detailed as follows:

1. *Ad valorem* tax assessments by a county are presumed to be correct. *In re Appeal of Amp, Inc.*, 287 N.C. 547, 562, 215 S.E.2d 752, 761 (1975).

2. A taxpayer may rebut this presumption by "produc[ing] 'competent, material and substantial' evidence that tends to show that: (1) [e]ither the county tax supervisor used an arbitrary method of valuation; or (2) the county tax supervisor used an illegal method of valuation; and (3) the assessment substantially exceeded the true value in money of the property." *Id.* at 563, 215 S.E.2d at 762 (emphasis omitted).

3. Once a taxpayer produces sufficient evidence to rebut the presumption, the burden shifts to the taxing authority to show that its "methods [do] in fact produce true values[.]" *In re Southern Railway*, 313 N.C. 177, 182, 328 S.E.2d 235, 239 (1985).

On remand from *IBM Credit I*, the Commission allowed additional briefing, but took no new evidence. The Commission then issued a second final decision, which again upheld Durham County's tax appraisal of \$144,277,140.00. IBM Credit timely filed notice of this current appeal.

## STANDARD OF REVIEW

Section 105-345.2(b) of our General Statutes sets forth the applicable scope of review in this case, and requires this Court "[s]o far as necessary to the decision and where presented, . . . [to] decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action." N.C. Gen. Stat. § 105-345.2(b) (2007). After deciding essential questions of law, this Court is authorized, if necessary, to "remand the case for further proceedings[.]" *Id.*

## IN RE APPEAL OF IBM CREDIT CORP.

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## DISCUSSION

At the outset of the Commission's hearing, Durham County produced evidence to justify its assessment, which applied the acquisition costs of IBM Credit's equipment to the percentages contained in Schedule U5. Without any other evidence to the contrary, this would justify the Commission finding that the "true value" of IBM Credit's equipment was obtained, and this presumption of correctness was in fact relied upon by the Commission. *Amp., Inc.*, 287 N.C. at 562, 215 S.E.2d at 761.

The evidence presented by Durham County to the Commission included the introduction of Schedule U5 and its transmittal memorandum together with exhibits showing the mathematical application of the schedule. In addition, Durham County presented the testimony of David B. Baker of the Department of Revenue, Property Tax Division, who testified that Schedule U5 was developed in 1994 by the Department of Revenue based upon an unnamed Property Tax Commission case heard at that time. He explained that the schedule was premised upon a five-year life for computer equipment, and originally provided for a fifteen percent residual value at the end of the five-year period. However, the residual value was reduced from fifteen percent to ten percent.

The Commission found that Durham County applied this revised five-year depreciation schedule to IBM Credit's equipment. In particular, the Commission found that "Durham County used the original cost listed by IBM Credit on its business personal property listing by year for the computer and computer-related equipment and then applied Schedule U5 to arrive at the final value for each listing." The Commission also found that this approach was "*similar* to the cost approach to value computer and computer-related equipment." (Emphasis added.) The Commission further found that

[w]hen using Schedule U5, Durham County used a method of appraisal that accounts for changes in the computer industry. In particular, Schedule U5 takes a thirty percent deduction for functional and economic obsolescence. Thereafter, a straight line depreciation is taken for the next five years with a residual value of ten percent, until the property is no longer listed for taxation.

Based upon these and other findings, which to some extent are repetitive, the Commission reached the conclusion of law that Durham County met its "burden."

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The Commission's Final Decision is not clear as to which "burden" Durham County has met. For purposes of our analysis we will assume, even though the Commission does not expressly designate, that the Commission found Durham County met both its initial *prima facie* case and the burden of proof on the ultimate issue. The failure of the Commission's decision to explicitly make these findings is problematic for this Court on review. Had the Final Decision adequately tracked the detailed burden-shifting analysis required by *IBM Credit I* and our case law, this assumption would not be necessary. Nonetheless, we agree with the Commission that the quantum of evidence produced by the County was sufficient to establish a presumption of correctness for the Durham County tax appraisal values—though Durham County was not under an affirmative duty to present extensive evidence in order to receive this initial presumption.

In response to Durham County's presumption of correctness, IBM Credit argues that Schedule U5 does not produce a "true value" or "fair market value" for its equipment, because the schedule does not properly account for functional or economic obsolescence present in the 2001 computer and computer equipment market. IBM Credit contends in particular that the County's appraised values are illegal or arbitrary, because the appraiser did not follow the requirements of N.C. Gen. Stat. § 105-283 (2007)<sup>1</sup> in considering "the effect of obsolescence on the property."

To support this argument, IBM Credit employed NACOMEX U.S.A., Inc. ("NACOMEX") to determine the value of its computer and computer-related equipment. Robert J. Zises, President of NACOMEX, was stipulated to be an expert in computer appraisals and the computer market. As part of its business, NACOMEX maintains a database of "transactional sales observations" covering a period in excess of ten years reflecting secondary sales (brokerages sales) of computer and computer-related equipment. NACOMEX maintains this database as a resource of providing computer valuation information to various clients who use the information to establish values for their tangible property.

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1. "All property, real and personal, shall as far as practicable be appraised or valued at its true value in money. When used in this Subchapter, the words "true value" shall be interpreted as meaning market value, that is, the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used." N.C.G.S. § 105-283.

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Mr. Zises used a subset of this database to develop depreciation tables for IBM Credit in determining a value for the computer and computer-related equipment in issue. As explained in his appraisal report (“NACOMEX report”), Mr. Zises developed these depreciation tables using the “market” or “sales comparison approach” rather than the “cost” or “income” approach, because in his opinion it was the best method to appraise the property. By applying the depreciation tables developed by Mr. Zises, IBM Credit determined the aggregate market value of its equipment to be \$96,458,707.00.

In addition to the values obtained from the NACOMEX report, IBM Credit argues that the record is uncontradicted that rapid technological changes in the computer industry causes rapid decreases in the market value of computer equipment. IBM Credit contends that this fact is unaccounted for in Schedule U5. In support of this contention, IBM Credit cites the Commission’s decision in *In re Appeals of Northern Telecom*, N.C. St. Tax Rep. (CCH) ¶201-813 (May 20, 1994), which held that values obtained using a former version of Schedule U5 were deficient because the assessor “fail[ed] to consider market information about the prices of new and used equipment in the taxpayer’s industry.” *In re Appeals of Northern Telecom*, N.C. St. Tax Rep. (CCH) ¶201-813 at Conclusion of Law No. 1 (May 20, 1994). While the version of Schedule U5 found deficient in *Northern Telecom* has since been modified, IBM Credit maintains that the modified version still does not accurately reflect the value at which computer property is sold in the marketplace. IBM Credit cites the testimony of the Durham County expert who developed Schedule U5 in support of this contention. That expert, Mr. Baker, testified before the Commission that the depreciation tables were not based on actual market purchases and sales.

Although the Commission does not explicitly state what effect, if any, all this evidence has on the legal presumption of correctness, for purposes of this decision we hold that it is “‘competent, material and substantial’ evidence *tending to show* that “the county tax supervisor used an arbitrary method of valuation” which led to “the assessment substantially exceed[ing] the true value in money of the property.” *Amp, Inc.*, 287 N.C. at 563, 215 S.E.2d at 762 (emphasis omitted) (internal quotation marks omitted). Therefore, the burden of persuasion and going forward with evidence that the methods used do in fact produce “true value” shifts to Durham County. *Southern Railway*, 313 N.C. at 182, 328 S.E.2d at 239; N.C.G.S. § 105-283.

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The critical determination at the final stage of the burden shifting analysis is whether the tax appraisal methodology adopted by the tax appraiser is the proper “means” or methodology given the characteristics of the property under appraisal to produce a “true value” or “fair market value.” N.C.G.S. § 105-283. While this question may be answered by resorting to experts or treatises, the burden shifting analysis also requires the trier of fact to test the validity of the appraisal premises underlying the appraisal methodology used. As our Supreme Court stated in *Southern Railway*, “it became the Commission’s duty to hear the evidence of both sides, to determine its weight and sufficiency and the credibility of witnesses, to draw inferences, and to appraise conflicting and circumstantial evidence, all in order to determine whether the Department met its burden.” *Southern Railway*, 313 N.C. at 182, 328 S.E.2d at 239.

While the Commission found that Durham County had met its burden, its final decision fails to adequately address key issues necessary to arrive at the ultimate decision required: What is the market value of the property being appraised? N.C.G.S. § 105-283. These omissions result in conclusions which lack evidentiary support and are therefore arbitrary and capricious.

First, there is no discussion in the final decision of why the cost approach, as opposed to the sales comparison or income approach, is an appropriate means to appraise this property. By relying primarily on the application of Schedule U5, the final decision fails to address a fundamental appraising issue—which approach to value is appropriate in light of all the facts and circumstances?

Here, the taxpayer presented a reasoned alternative approach to the method used by the county tax appraiser. In such a circumstance, one would expect the Commission to evaluate the methodology presented by the parties based upon uniform appraising standards and to find which approach to value is the appropriate approach. The fact that the final decision lacks this evaluation supports the appellant’s contention that the Commission acted arbitrarily.

Second, there is no discussion in the final decision of why the income method of appraising was not employed or used to modify the other approaches. This omission is troubling given that the property being appraised is income-producing. Normally, where more than one approach to value is being considered, some synthesis of values is produced to explain, based upon a uniform appraisal standard, why

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the approach selected was correct and how the appraisal dispute should be resolved.

Third, the Commission's final decision fails to address a fundamental issue in the application of any trending or depreciation schedule—the useful life of the property under appraisal. It is uncontested from the record that the useful life of seventy-five to eighty percent of the property being appraised is three years. This useful life is based upon the uncontested fact that IBM Credit's property is only leased for three years by most lessees at which time the property reaches its residual value. It is similarly uncontested from the record that Schedule U5 assumes a useful life of the property as being five years before it reaches its residual value. While it is possible to assume that computer equipment could have a five-year useful life as part of an operating business, such assumption is clearly rebutted by IBM Credit, which leases the computer equipment that it owns for only three years.

Fourth, the final decision fails to explain the valuation premises behind the thirty percent deduction in year one of Schedule U5. While the Commission found that Schedule U5 takes a thirty percent deduction for functional and economic obsolescence, it is unclear from the record whether the thirty percent deduction is attributable to just these two factors alone. Put differently, it is unclear whether this thirty percent also includes deductions for physical deterioration. Moreover, assuming this thirty percent includes deductions for physical deterioration, it is also unclear how the deduction for physical deterioration, functional obsolescence, and external obsolescence are allocated among the thirty percent. Because Durham County has the burden of proof at this stage of evaluation, it is incumbent upon the county to show the Commission the premises which underlie this thirty percent figure, and how it accomplishes the valuation goal of properly accounting for depreciation factors such as functional obsolescence.

Fifth, the Commission does not address why the facts and circumstances of the valuation do not require the appraiser to make adjustments for additional functional or economic obsolescence or for other factors. The transmittal memorandum sending the schedules developed by the Department of Revenue to county tax appraisers clearly signals to the county tax appraisers that “[t]here will be situations where the appraiser may need to make adjustments for additional functional or economic obsolescence, or for other fac-

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tors.” Moreover, it is unclear what relationship the thirty percent depreciation figure has with the county appraiser’s need to consider circumstances which would call for additional depreciation as provided for in the guidelines. Where the taxpayer calls to the attention of the appraiser and the Commission facts and circumstances which require special consideration of additional factors, the decision of the county tax appraisers must be evaluated and explained. The rejection of the additional depreciation argument may be justified in some way, but the final decision does not explain why or upon what facts this conclusion would be reached.

Finally, the Commission’s finding that Schedule U5 is similar to the cost approach to value is unsupported. The Commission cites the NACOMEX report as its authority for this proposition. In the NACOMEX report, Mr. Zises explains how the calculation of depreciation is measured in the cost approach:

The cost approach commonly measures value by estimating the current cost of a new asset, then deducting for various elements of depreciation, including physical deterioration and functional and external obsolescence to arrive at “depreciated cost new.” The “cost” may be either reproduction or replacement costs. The logic behind this method is that an indication of value of the asset is its cost (reproduction or replacement) less a charge against various forms of obsolescence such as functional, technological and economic as well as physical deterioration if any.

Thus:   Current Cost of Replacement or  
          Reproduction New  
                  less  
          Physical Deterioration  
                  less  
          Functional Obsolescence  
                  less  
          External Obsolescence  
                  results in  
          Fair Market Value

This evidence does not support the Commission’s conclusions. Neither Durham County nor the Commission used the method described by Mr. Zises as the “cost approach” method. It is uncontested that the county started its evaluation by using historical costs as its starting point instead of cost of replacement or reproduction

new. There is no evidence to suggest that Schedule U5 or the county considers the cost of replacement or reproduction new for this property. No evidence was introduced to provide these figures for the Commission. Indeed, Schedule U5 suggests that the starting point for the cost method the Department of Revenue uses is to take the historical cost and apply a trending factor as contained in the tables to obtain reproduction cost new. This appears to miss a critical step in the appraisal analysis, particularly when technological improvements in the equipment being trended, such as computers, may have all the utility of the machine being appraised but sell for less money than the subject machine cost several years previous. Historical costs simply capture the starting value. Replacement cost new for similar capacity computer machines are the cost to replace identical equipment in the current market.

Altogether, this controversy involves two drastically differing methods for depreciating IBM Credit's computer equipment. In considering depreciation, two cautions relevant to our consideration are reflected in the discussion of "Valuation Depreciation and Accounting Depreciation" in *Valuing Machinery and Equipment: The Fundamentals of Appraising Machinery and Technical Assets* by Machinery and Technical Specialties Committee of the American Society of Appraisers.

First, the treatise advises:

Although USPAP requires that all three approaches to value be considered, the valuation of certain assets or the valuation premise under consideration may make the use of all three approaches impractical. . . . The cost approach, without sufficient research and quantification of depreciation and obsolescence, may not accurately reflect the fair market value of a particular asset.

Secondly, the treatise advises:

Depreciation is another term that appraisers use differently from nonappraisers. In particular the valuation concept of depreciation differs from the accounting concept of depreciation. Depreciation for valuation purposes is the estimated loss in value of an asset, compared with a new asset; appraisal depreciation measures value inferiority that is caused by a combination of physical deterioration, functional obsolescence, and economic (or external) obsolescence.

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It is important for the appraiser to understand that the accounting depreciation process is one of cost allocation only. It is not a method of valuation. Because a company's fixed assets are not held for resale, there is no attempt to reflect any change in the market value of the assets. As depreciation is calculated from period to period, it is added to an accumulated depreciation account. Depreciation for accounting purposes may be thought of as a mathematical procedure for recovering the original cost of an asset in consistent installments over a specified period.

Because Schedule U5 appears to mirror accounting depreciation methods and not valuation depreciation methods, its applicability in this case without justification is suspect, and the Commission's finding that Schedule U5 properly provides for "functional and economic" obsolescence is not supported by evidence in the record.

The Commission's final decision contains the following argument: The Department of Revenue's Schedule U5 is legal and typically used by all 100 counties. Durham County used the Department of Revenue's Schedule U5, which is based upon the cost method of valuation, and the cost method of valuation contains depreciation elements which deduct value for "obsolescence" and "functionality." Schedule U5 therefore produces a market value or true value of the property appraised.

However, if this contention prevails, then tax appeals would simply be limited to determining whether or not the proper government schedule was employed. This is not what is contemplated in the burden shifting analysis required by this Court in *IBM Credit I* or by case law.

The Commission found that the evidence produced by Mr. Zises was flawed with regard to several factors. These factors include the failure of Mr. Zises to consider use of the computers in the market; design factors inherent in IBM Credit's equipment that impair the equipment's desirability or usefulness in the current market; and criticisms of the use of the subset of data upon which the depreciation tables used by Mr. Zises were obtained. For purposes of our review, we do not have to determine whether these findings are supported by the evidence or whether the values produced by Mr. Zises' depreciation tables are accurate.

In appraising IBM Credit's property, Durham County did not meet the statutory standards required of N.C.G.S. § 105-283. In reviewing the methods applied by Durham County, we hold that the county did

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not make adequate deductions for depreciation by applying Schedule U5 and its transmittal instructions. The failure to make additional depreciation deductions due to functional and economic obsolescence due to market conditions results in an appraisal which does not reflect “true value.” The decision of the Commission upholding the appraisal is unsupported by substantial evidence based upon a review of all the evidence in the record. Because we are not a fact-finding body, we do not make a finding as to the proper amount of additional depreciation deduction to be applied upon remand. We therefore reverse the Final Decision of the Commission, and again remand to the Commission for a reasoned decision with regard to what amount of depreciation deduction should have been deducted from the valuation to account for functional and economic obsolescence due to market conditions.

Reversed and remanded.

Chief Judge MARTIN and Judge STEPHENS concur.

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STATE OF NORTH CAROLINA v. ROBERT MACFARLANE DAVISON

No. COA09-212

(Filed 8 December 2009)

**1. Sentencing— lifetime satellite-based monitoring—  
required findings**

The trial court did not follow correct procedure when including lifetime satellite-based monitoring (SBM) in defendant’s sentence for indecent liberties and attempted first-degree sexual offense. The court did not make the findings required by N.C.G.S. § 14-208.40A (pre-2008 amendment) before reaching the risk assessment stage.

**2. Sentencing— sexual offenses—aggravated—consideration  
of underlying facts**

The trial court erred when sentencing defendant for indecent liberties and attempted first-degree sexual offense by finding that defendant was convicted of an aggravated offense based in part on defendant’s plea colloquy. The language of the stat-

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utes is clear: when making a determination pursuant to N.C.G.S. § 14-208.40A (pre-2008 amendment), the trial court is only to consider the elements of the offense of which defendant was convicted and not the underlying factual scenario.

Appeal by Defendant from judgment and order entered 29 September 2008 by Judge R. Stuart Albright in Superior Court, Forsyth County. Heard in the Court of Appeals 2 September 2009.

*Attorney General Roy Cooper, by Assistant Attorney General Joseph Finarelli, for the State.*

*Cheshire, Parker, Schneider, Bryan & Vitale, by John Keating Wiles, for Defendant-Appellant.*

McGEE, Judge.

Robert MacFarlane Davison (Defendant) entered an *Alford* plea of guilty on 29 September 2008 to attempted first-degree sex offense and taking indecent liberties with a child. The trial court sentenced Defendant to a term of 94 months to 122 months in prison and ordered Defendant, following his release from custody, to enroll in a satellite-based monitoring (SBM) program for the remainder of his natural life. Defendant appeals from the order subjecting him to SBM for the remainder of his natural life.

As a factual basis for Defendant's plea, the State asserted that BM, the victim, was five years old at the time of the offense. BM, along with her mother and sister, had been staying with Defendant in his residence after BM's mother moved from her marital residence because of family issues. BM's mother left BM in Defendant's care during the evenings while she worked.

BM informed her mother one morning that her "coochee [referring to her vagina] hurt because [Defendant] wouldn't quit touching it." BM's mother inspected that area of BM's body and took BM to an emergency room. Defendant was subsequently charged with first-degree sex offense and indecent liberties with a child. Defendant entered an *Alford* plea in exchange for the State's agreement to reduce the charge of first-degree sex offense to attempted first-degree sex offense and to limit the sentence for the charge of indecent liberties to the bottom of the mitigated range.

In entering his plea, Defendant made the following statement to the trial court:

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I want it perfectly clear that everybody says I put my finger in her, it was the very tip. I did not insert my finger like everybody is implying. Like when you swipe for a booger, that's all, but under the statute law, that was a crime. . . . I meant no harm. She was the one laying on the floor. She was the one that I say lethargic [sic], because I had a massive migraine and I didn't understand at the time that she had actually—was falling asleep. This was at a mid-night time frame and I now know that she had fallen asleep, and when I woke her up laying on the bathroom floor, it caught her by surprise. And when she said her weewee hurt, I had all these toys and I didn't know—I said, "Why does your weewee hurt?" She had mentioned that she had put something where she shouldn't have. So that's why my mind thought, well, maybe she put something in there. So I wasn't trying to molest her. . . .

The trial court accepted Defendant's plea, finding that both of the offenses were "sexually violent offenses as defined by statute, making both of them reportable [convictions pursuant to N.C. Gen. Stat. § 14-208.6(4).]" The trial court also found that the offenses "involve[d] the sexual, physical and mental abuse of a minor."

The trial court entered the following order:

The [c]ourt would order the State to have a risk assessment performed on this offender before the end of the day, if at all possible, and report back to the [c]ourt. Given the fact of his confession, which I was unaware of, and given the fact of what he's pleading guilty to, I'd be inclined to still find it's an aggravated offense when you combine the two together. However, I still want to see the risk assessment in any event, and I will continue these proceedings. That's the judgment of the [c]ourt. The only reason I'm continuing the rest of the proceedings is to determine the duration of the lifetime or the duration of the satellite monitoring and possibly lifetime registration requirements.

In a brief exchange with Defendant's counsel, the trial court stated: "At this point, I would be inclined to find an aggravated offense. However, because we can do it and I'd rather just go ahead and do it on the front end, let's go ahead and have his risk assessment performed."

The risk assessment was completed that day and Defendant was determined to be in the "Low" risk category. After reviewing the risk assessment, the trial court then made the following announcement:

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All right. I have the assessment. It's a low category. Notwithstanding what the assessment is—and I appreciate the assessment being completed—obviously I didn't know all the facts of the case until I heard from both parties. Given the fact that it's undisputed about at least the defendant's confession as to what he—it's no longer allegedly did to the victim in the case. I understand there are different reasonings possibly, but coupled with what he did, his overt acts to the child, with his pleas, I'm going to find it to be an aggravated offense and I will order monitoring and registration for a lifetime. That's going to be the judgment of the [c]ourt.

*Defendant's Argument*

Defendant argues the trial court erred in ordering that Defendant be registered as a sex offender for life and also be enrolled in SBM for life, because the trial court lacked statutory authority to do so. Defendant asserts that the trial court failed to follow the procedure set forth by statute for determining whether SBM is required. Defendant also argues the trial court lacked statutory authority to order Defendant to enroll in SBM for life because its finding that the crimes to which Defendant entered *Alford* pleas constituted "aggravated offense[s]" was erroneous as a matter of law. We agree and address each argument in turn.

Resolution of issues involving statutory construction is "ultimately a question of law for the courts." *Brown v. Flowe*, 349 N.C. 520, 523, 507 S.E.2d 894, 896 (1998). " '[W]here an appeal presents [a] question[] of statutory interpretation, full review is appropriate,' ' and we review a trial court's conclusions of law *de novo*.'" *Bruning & Federle Mfg. Co. v. Mills*, 185 N.C. App. 153, 156, 647 S.E.2d 672, 674, *cert. denied*, 362 N.C. 86, 655 S.E.2d 837 (2007), (quoting *Coffman v. Roberson*, 153 N.C. App. 618, 623, 571 S.E.2d 255, 258 (2002)). We therefore review *de novo* the trial court's interpretation of the procedure required under N.C. Gen. Stat. § 14-208.40A and the trial court's application of the statutory procedure in this case.

In matters of statutory interpretation, our Court applies the following principle set forth by our Supreme Court: " '[w]hen the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required.' " *State v. Abshire*, 363 N.C. 322, 329-30, 677 S.E.2d 444, 450 (2009) (quoting *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006)).

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*Sentencing Procedure*

[1] We first address whether the trial court followed the correct procedure in sentencing Defendant. We hold that it did not.

The SBM program was created to monitor two categories of offenders:

- (1) Any offender who is convicted of a reportable conviction as defined by G.S. 14-208.6(4) and who is required to register under Part 3 of Article 27A of Chapter 14 of the General Statutes because the defendant is classified as a sexually violent predator, is a recidivist, or was convicted of an aggravated offense as those terms are defined in G.S. 14-208.6.
- (2) Any offender who satisfies all of the following criteria: (i) is convicted of a reportable conviction as defined by G.S. 14-208.6(4), (ii) is required to register under Part 2 of Article 27A of Chapter 14 of the General Statutes, (iii) has committed an offense involving the physical, mental, or sexual abuse of a minor, and (iv) based on the Department's risk assessment program requires the highest possible level of supervision and monitoring.

N.C. Gen. Stat. § 14-208.40(a) (2007).

N.C. Gen. Stat. § 14-208.40A (2007) sets forth the procedural framework for a determination of SBM enrollment.<sup>1</sup> First, a trial court must determine whether a defendant's conviction is "a reportable conviction" as defined by N.C. Gen. Stat. § 14-208.6(4). N.C. Gen. Stat. § 14-208.40A(a) (2007). A "reportable conviction" is defined in pertinent part as "[a] final conviction for an offense against a minor, a sexually violent offense, or an attempt to commit any of those offenses unless the conviction is for aiding and abetting[.]" N.C. Gen. Stat. § 14-208.6(4)(a) (2007).

The next step requires that

the district attorney shall present to the court any evidence that (i) the offender has been classified as a sexually violent predator pursuant to G.S. 14-208.20, (ii) the offender is a recidivist, (iii) the conviction offense was an aggravated offense, or (iv) the offense

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1. We note that N.C.G.S. § 14-208.40A was amended in 2008 by 2008 N.C. Sess. Laws 117. However, this amendment did not take effect until 1 December 2008. Defendant's sentencing hearing occurred on 29 September 2008 and was therefore subject to the 2007 version of the statute.

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involved the physical, mental, or sexual abuse of a minor. The district attorney shall have no discretion to withhold any evidence required to be submitted to the court pursuant to this subsection.

The offender shall be allowed to present to the court any evidence that the district attorney's evidence is not correct.

N.C.G.S. § 14-208.40A(a).

After presentation of the above-described evidence by the district attorney, the trial court must determine whether a defendant's conviction places the defendant "in one of the categories described in G.S. 14-208.40(a)[.]" N.C. Gen. Stat. § 14-208.40A(b)(2007). If so, the trial court

shall make a finding of fact of that determination, specifying whether (i) the offender has been classified as a sexually violent predator pursuant to G.S. 14-208.20, (ii) the offender is a recidivist, (iii) the conviction offense was an aggravated offense, or (iv) the offense involved the physical, mental, or sexual abuse of a minor.

*Id.*

The trial court next determines whether SBM enrollment is warranted. N.C.G.S. § 14-208.40A provides:

- (c) If the court finds that the offender has been classified as a sexually violent predator, is a recidivist, or has committed an aggravated offense, the court shall order the offender to enroll in a satellite-based monitoring program for life.
- (d) If the court finds that the offender committed an offense that involved the physical, mental, or sexual abuse of a minor, that offense is not an aggravated offense, and the offender is not a recidivist, the court shall order that the Department [of Corrections] do a risk assessment of the offender. The Department shall have a minimum of 30 days, but not more than 60 days, to complete the risk assessment of the offender and report the results to the court.

N.C.G.S. § 14-208.40A. Subsection (d) is clear that a risk assessment will be ordered only where subsection (c) is not implicated.

Finally, after receiving the risk assessment from the Department of Correction (DOC), the trial court

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shall determine whether, based on the Department's risk assessment, the offender requires the highest possible level of supervision and monitoring. If the court determines that the offender does require the highest possible level of supervision and monitoring, the court shall order the offender to enroll in a satellite-based monitoring program for a period of time to be specified by the court.

N.C. Gen. Stat. § 14-208.40A(e)(2007).

*The Procedure Used by the Trial Court*

In the case before us, the trial court failed to correctly follow the above-described statutory procedure set forth by the General Assembly. The trial court correctly made an initial finding that Defendant had been convicted of a reportable offense pursuant to N.C.G.S. § 14-208.6(4) and (5). Having found that Defendant was convicted of a reportable offense, the trial court further found that the offenses involved sexual, physical, and mental abuse of a minor.

At this point, the trial court made no findings that Defendant had been convicted of an aggravated offense as required by N.C.G.S. § 14-208.40A(b). In determining whether to proceed pursuant to subsection (c) or subsection (d) of § 14-208.40A, a trial court must make the determinations required by parts (b)(i) through (b)(iv). For example, to reach the risk-assessment stage under subsection (d), a trial court must first determine that an "offender committed an offense that involved the physical, mental, or sexual abuse of a minor," as well as both of the following: "that [the] offense is not an aggravated offense, and the offender is not a recidivist[.]" N.C.G.S. § 14-208.40A(d). In the case before us, the trial court failed to make these determinative findings.

Instead, the trial court ordered a risk assessment to be completed that afternoon, if possible.<sup>2</sup> The trial court further stated: "Given the fact of his confession, which I was unaware of, and given the fact of what he's pleading guilty to, I'd be inclined to still find it's an aggravated offense when you combine the two together. However, I still want to see the risk assessment in any event[.]" Clearly, the trial court withheld its finding pursuant to subsection (b) until after a risk assessment pursuant to subsection (d) was performed, demonstrat-

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2. We note that the trial court did not allow the DOC the statutorily-mandated period of thirty to sixty days for the DOC to perform its risk assessment. However, Defendant did not argue this point in his brief.

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ing the trial court's intent to make a determination under subsection (b) based on information obtained in the risk assessment. This procedure employed by the trial court is not provided for in N.C.G.S. § 14-208.40A.

The framework set forth in N.C.G.S. § 14-208.40A requires a trial court to hear evidence presented by the State and any possible contrary evidence by a defendant before making its determination under subsection (b). The statute does not provide that the trial court consider the result of a risk assessment in conjunction with the State's evidence at this point in the proceeding. The trial court erred by failing to follow the statutory framework provided by N.C.G.S. § 14-208.40A when it failed to properly make determinations pursuant to subsection (b). By failing to properly make these determinations, the court prematurely ordered the risk assessment and improperly considered sentencing pursuant to subsections (c) and (d) simultaneously. Therefore, we vacate the trial court's order and remand for proceedings in accordance with N.C.G.S. § 14-208.40A.

*An "Aggravated Offense"*

[2] Defendant further argues that the trial court's "finding of fact" that Defendant was convicted of "an aggravated offense" was incorrect as a matter of law. Where a trial court makes a conclusion of law but erroneously labels it a finding of fact, the conclusion is nonetheless reviewed *de novo*. See *Eakes v. Eakes*, — N.C. App. —, —, 669 S.E.2d 891, 897 (2008). Defendant entered an *Alford* plea to attempted first-degree sex offense and taking indecent liberties with a child. We hold that neither of these offenses is "an aggravated offense" within the meaning of N.C. Gen. Stat. § 14-208.6(1a).

As discussed above, "[w]hen the language of a statute is clear and without ambiguity, it is the duty of [our Courts] to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required." *Abshire*, 363 N.C. at 329-30, 677 S.E.2d at 450 (quoting *Diaz*, 360 N.C. at 387, 628 S.E.2d at 3). Because we find the statutes at issue in this case to be clear and unambiguous, we apply their plain meaning.

N.C. Gen. Stat. § 14-208.6(1a) defines an "aggravated offense" as any criminal offense that includes either of the following: (i) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim of any age through the use of force or the threat of serious violence; or (ii) engaging in a sexual act involving vagi-

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nal, anal, or oral penetration with a victim who is less than 12 years old.

N.C. Gen. Stat. § 14-208.6(1a)(2007).

Reviewing the plain language of the statute, it is clear that an “aggravated offense” is an offense including: first, a sexual act involving vaginal, anal or oral penetration; and second, either (1) that the victim is less than twelve years old or (2) the use of force or the threat of serious violence against a victim of any age. Defendant and the State agree that, while a completed first-degree sexual offense would be an aggravated offense, an attempted first-degree sexual offense is not an aggravated offense. *See State v. Coble*, 351 N.C. 448, 449, 527 S.E.2d 45, 46 (2000) (noting that a conviction for attempt involves the intent to commit the substantive offense, an act done in an effort to commit that offense, but which ultimately falls short of the completed offense). Because Defendant was convicted of a crime that fell short of a completed sexual act with BM, he was not convicted of “any criminal offense that include[d] . . . engaging in a sexual act[.]” with respect to the charge of attempted sex offense. N.C.G.S. § 14-208.6(1a). Thus, we limit our review to the charge of indecent liberties.

N.C. Gen. Stat. § 14-202.1(a) states:

A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:

- (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or
- (2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.

N.C. Gen. Stat. § 14-202.1(a) (2007).

Our Courts have likewise enumerated the elements of indecent liberties with a child as follows:

- (1) the defendant was at least 16 years of age; (2) he was five years older than his victim; (3) he willfully took or attempted to take an indecent liberty with the victim; (4) the victim was under

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16 years of age at the time the alleged act or attempted act occurred; and (5) the action by the defendant was for the purpose of arousing or gratifying sexual desire.

*State v. Martin*, — N.C. App. —, —, 671 S.E.2d 53, 59 (2009). *See also State v. Rhodes*, 321 N.C. 102, 104-05, 361 S.E.2d 578, 580 (1987).

Comparing the statutory definition of “aggravated offense” to the elements of indecent liberties, we find significant differences between the two. A conviction of indecent liberties requires none of the three factors required by the definition of an “aggravated offense.” First, the crime of indecent liberties does not require that the defendant commit “a sexual act involving vaginal, anal or oral penetration.” Second, the crime of indecent liberties does not require that the victim be less than twelve years of age. Third, the crime of indecent liberties does not require in the alternative that the offense be committed through the use of force or the threat of serious violence. Instead, the conduct required to sustain a conviction of indecent liberties includes the taking of “immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire[,]” or “any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.” N.C. Gen. Stat. § 14-202.1(a).

The State argues that, should we limit the trial court’s examination to the elements of the offense, we would render only four crimes “aggravated offenses” for the purpose of this statute. We are aware of this limitation, but we are bound by principles of statutory interpretation and we must not enter the realm of the General Assembly to extend the scope of the statute.

The trial court’s conclusion that Defendant committed an “aggravated offense” was based in part upon Defendant’s colloquy at trial. The trial court’s reliance on Defendant’s statements is evident in the trial court’s statement at sentencing:

Given the fact of his confession, which I was unaware of, and given the fact of what he’s pleading guilty to, I’d be inclined to still find it’s an aggravated offense when you combine the two together.

...

Notwithstanding what the assessment is—and I appreciate the assessment being completed—obviously I didn’t know all the

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facts of the case until I heard from both parties. Given the fact that it's undisputed about at least the defendant's confession as to what he—it's no longer allegedly did to the victim in the case. I understand there are different reasonings possibly, but coupled with what he did, his overt acts to the child, with his pleas, I'm going to find it to be an aggravated offense and I will order monitoring and registration for a lifetime.

For reasons discussed below, the trial court's consideration of Defendant's recitation of the underlying facts giving rise to his convictions was error.

N.C. Gen. Stat. §§ 14-208.40 through 14-208.45 govern "Sex Offender Monitoring" and these statutes are designed to monitor, *inter alia*:

Any offender who is *convicted* of a reportable *conviction* as defined by G.S. 14-208.6(4) and who is required to register under Part 3 of Article 27A of Chapter 14 of the General Statutes because the defendant is classified as a sexually violent predator, is a recidivist, or was *convicted of an aggravated offense* as those terms are defined in G.S. 14-208.6.

N.C.G.S. § 14-208.40(a)(1) (emphasis added). Likewise, N.C.G.S. § 14-208.40A(a) requires the trial court to hear evidence that "the *conviction offense* was an aggravated offense." N.C.G.S. § 14-208.40A(a) (emphasis added). N.C.G.S. § 14-208.40A(b) requires the trial court to make a determination regarding "whether the offender's *conviction* places the offender in one of the categories described in G.S. 14-208.40(a)[.]" N.C.G.S. § 14-208.40A(b) (emphasis added).

We find the language of the statutes at issue is clear. The General Assembly's repeated use of the term "conviction" compels us to conclude that, when making a determination pursuant to N.C.G.S. § 14-208.40A, the trial court is only to consider the elements of the offense of which a defendant was convicted and is not to consider the underlying factual scenario giving rise to the conviction. In the case before us, the trial court erred when making its determinations by considering Defendant's plea colloquy in addition to the mere fact of his conviction.

Because the trial court failed to follow the required sentencing procedure, we vacate its order requiring Defendant to enroll in an SBM program for life and remand for a determination of Defend-

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ant's SBM eligibility pursuant to the procedure set forth in N.C.G.S. § 14-208.40A, as discussed herein.

Vacated and remanded.

Judges STEELMAN and JACKSON concur.

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PATRICIA HEFLIN, WIDOW; CHRISTOPHER HEFLIN AND GREGORY HEFLIN, BY THEIR GUARDIAN *AD LITEM*, N. VICTOR FARAH; ANDREW HEFLIN, BY HIS GUARDIAN *AD LITEM*, CINDY DIGGS; AND CLAUDE HEFLIN AND LOWELL HEFLIN, BY THEIR GUARDIAN *AD LITEM*, LISA WAYNE, PLAINTIFFS v. G.R. HAMMONDS ROOFING, INC., EMPLOYER, AMERICAN INTERSTATE INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA08-1309

(Filed 8 December 2009)

**1. Workers' Compensation— failure to rule on motion to stay—wrongful death claim in another state**

The Industrial Commission erred by ignoring plaintiff's motion to stay her pending workers' compensation proceedings in North Carolina so that she could pursue her wrongful death claim against defendants in Florida. Plaintiff could be deemed by the Florida courts to have elected the workers' compensation remedy, thereby precluding her wrongful death action. The Commission's opinion and award was vacated and remanded for a ruling on plaintiff's motion for a stay.

**2. Workers' Compensation— findings of fact—sufficiency of evidence**

The Industrial Commission erred in a workers' compensation case by making certain findings of fact, which were supported by competent evidence. In the event the Commission decides to deny plaintiff's motion for a stay, it must make new findings of fact, based on the competent evidence, and new conclusions of law based on those findings.

Appeal by plaintiff from opinion and award entered 30 July 2008 by the North Carolina Industrial Commission. Heard in the Court of Appeals 9 April 2009.

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*Law Offices of Kathleen G. Sumner, by Kathleen G. Sumner and Jeanette F. Gray, for plaintiff-appellant Patricia Heflin.*

*Lewis & Roberts, P.L.L.C., by John D. Elvers, Sarah C. Blair, and Melissa K. Walker, for defendants-appellees.*

GEER, Judge.

Plaintiff Patricia Heflin appeals the opinion and award of the Full Commission ordering defendants to pay her death benefits at the rate of \$64.62 per week from 2 April 2004 through the date of the deputy commissioner's opinion and award on 8 January 2008, but no further. On appeal, Ms. Heflin contends that the Commission erred in failing to rule on her motion to stay her pending workers' compensation proceedings in North Carolina so that she could pursue her wrongful death claim against defendants in Florida. Because we agree that the Commission, in ignoring Ms. Heflin's motion, disregarded its duty to hear and rule on every issue raised by the parties, we vacate the Commission's opinion and award and remand for a ruling on Ms. Heflin's motion for a stay.

Facts

On 2 April 2004, Ms. Heflin's husband, Claude Franklin Heflin, Jr., was killed while working on a job site in Florida. He was survived by Ms. Heflin and his children by previous wives. On 21 April 2004, Ms. Heflin sent a letter to the field case manager for defendant American Interstate Insurance Company, identifying three dependent children of her husband, but indicating that there was an issue regarding a fourth child.

Mr. Heflin's employer, defendant G.R. Hammonds Roofing, Inc., and its insurance carrier, defendant American Interstate, did not accept or deny the claim for death benefits, but, instead, on 30 April 2004, filed a Form 33 Request for Hearing with the Industrial Commission, asking that the proper dependents be determined. In the Form 33, defendants incorrectly stated that Mr. Heflin's death occurred in Fayetteville, North Carolina.

Ms. Heflin filed a Form 18 Notice of Accident and Claim on 22 June 2004. On 10 January 2005, Ms. Heflin also filed a petition in Florida for workers' compensation benefits arising out of Mr. Heflin's injury. On 18 February 2005, Ms. Heflin's North Carolina attorney filed a motion to withdraw as her counsel. Ms. Heflin then sent an email on 21 February 2005 to Chief Deputy Commissioner Stephen L. Gheen

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with a copy to Deputy Commissioner Philip A. Baddour, III, defendants' counsel, the claims adjuster, and Ms. Heflin's counsel stating: "I am asking for a stay on this case, as I filed Workers' Compensation in Florida in January 2005. My attorney in Florida, Mark L. Zientz, P.A. has advised me that he spoke with a claims adjuster last week, and was advised that the claim has been sent to a defense attorney in Florida, and that he should soon be receiving a notice of appearance."

On 16 March 2006, Deputy Commissioner Baddour sent a letter to defendants' counsel, Ms. Heflin's Florida counsel, and the guardians ad litem for the minor children, addressing the need to locate two of the minor children. On 25 March 2005, Deputy Commissioner Baddour signed an order allowing Ms. Heflin's North Carolina attorney's motion to withdraw. No order was ever entered or communication sent regarding Ms. Heflin's 21 February 2005 request for a stay.

On 24 March 2005, Ms. Heflin voluntarily withdrew her petition for benefits in Florida. On 2 December 2005, however, Ms. Heflin filed a wrongful death claim in Florida, contending that the insurer failed to accept or respond to her Florida claim for workers' compensation benefits and was, therefore, estopped under Florida law from relying upon the exclusive remedy defense in the tort suit. On 7 May 2007, Mr. Zientz, Ms. Heflin's Florida workers' compensation attorney, sent a fax to Deputy Commissioner Baddour stating that Mr. Zientz understood that Ms. Heflin had withdrawn her claim for benefits under North Carolina law and had initiated a wrongful death action under Florida law against defendant Hammonds Roofing.

On 23 August 2007, the Deputy Commissioner conducted the hearing requested by defendants in their 30 April 2004 Form 33. Beginning in April 2005 and continuing through the date of the hearing, defendants, without filing any forms with the Commission, sent Ms. Heflin checks. Ms. Heflin accepted and cashed each of the checks. At the hearing, Ms. Heflin stated that she was renouncing her entitlement to future benefits. Ms. Heflin also claimed that she had renounced her entitlement to any and all benefits paid to her by defendants in the past. On 19 October 2007, defendants' counsel submitted a letter to Deputy Commissioner Baddour indicating that Ms. Heflin had continued to accept and cash checks dated through 27 September 2007.

On 8 January 2008, the Deputy Commissioner filed an opinion and award directing defendants to pay death benefits to three chil-

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dren from 2 April 2004 and continuing until the child reached age 18 or for 400 weeks, whichever was later. The Deputy Commissioner concluded that Ms. Heflin was estopped from renouncing benefits accepted prior to the opinion and award, but that she had effectively renounced any right to future benefits.

Ms. Heflin appealed to the Full Commission. In an opinion and award filed 30 July 2008, the Commission stated: "The sole issue before the Commission is to whom should death benefits be paid." With respect to Ms. Heflin, the Commission found that she was married to the deceased employee on the date of his death. The Commission then found that Ms. Heflin, through counsel, filed in the Industrial Commission a Form 18 Notice of Accident and Claim on 22 June 2004 and filed a Florida Petition for Workers' Compensation Benefits on 10 January 2005. The Commission observed, however, that Ms. Heflin's counsel had voluntarily dismissed that petition on 24 March 2005. The Commission further found that it had allowed Ms. Heflin's North Carolina counsel to withdraw as counsel, but stressed that "[t]he North Carolina claim was not, and has not been, dismissed." The Commission then acknowledged that Ms. Heflin filed a wrongful death claim in Florida on 2 December 2005 "based on her allegation that the insurer failed to accept or deny the Florida workers' compensation claim."

The Commission found that defendants made payments to Ms. Heflin "in the amount of \$41.00 per week (\$82.00 biweekly) from April 2, 2004 and continuing through the present in connection with her North Carolina workers' compensation claim." The Commission noted that Ms. Heflin admitted that she accepted and cashed the checks, but that she "stated in open court that she wishes to renounce her entitlement to future benefits pursuant to the present proceeding before the North Carolina Industrial Commission."

Based on these findings of fact, the Commission concluded:

The law of estoppel applies in workers' compensation cases as in all other cases. *Hughart v. Dasco Tran[s/p., Inc.]*, 167 N. C. App[.] 685, 606 S.E.2d 379 (2005). Patricia Heflin is estopped from claiming a renunciation of benefits prior to the entry of this Opinion and Award based upon her acceptance of benefits paid to her by defendants. However, based upon Ms. Heflin's statement in open court, and in her written contentions, that she wishes to renounce her right to future benefits pursuant to the present proceeding before the Commission, Ms. Heflin has effec-

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tively renounced her right to future benefits in North Carolina upon the entry of this Opinion and Award. Accordingly, Ms. Heflin is entitled to North Carolina death benefits at the rate of \$64.62 per week from April 2, 2004 through the date of the January 8, 2008 Opinion and Award by Deputy Commissioner Baddour and no further. Any payment of benefits by defendants to Ms. Heflin for periods after the entry of this Opinion and Award are gratuitous and have no effect on the benefits owing to other beneficiaries.

Neither the Commission's findings nor its conclusions of law mentioned Ms. Heflin's request for a stay.

Commissioner Bernadine S. Ballance dissented from the opinion and award. In her dissent, Commissioner Ballance first observed that both North Carolina and Florida had jurisdiction over Ms. Heflin's workers' compensation claim. Commissioner Ballance noted that defendants had filed a Form 33 seeking an expedited hearing in order to obtain an order for payment of death benefits, but that Ms. Heflin had requested a stay of the case in North Carolina, "inform[ing] the Industrial Commission that the claim had been filed in Florida in January 2005." Because "[n]o stay was granted[,]," the case was set for hearing on 23 August 2007 at which time Ms. Heflin made the attempted renunciation of benefits.

Commissioner Ballance determined that "[b]ased on the evidence before the Commission, Ms. Heflin's renouncement appears to be a response to the failure of the Commission to grant a stay to allow Ms. Heflin to proceed with her claim in Florida." Commissioner Ballance explained that she was dissenting because she was "of the opinion that the Commission should have granted Ms. Heflin's Motion for Stay as to her share of the benefits." She explained further: "Proceeding with the hearing before the North Carolina Industrial Commission forced Ms. Heflin to have to make a choice between her case in Florida and her claim in North Carolina. Therefore, Ms. Heflin was forced to choose renouncement of her North Carolina claim wherein she had a statutory right to benefits in order to pursue her remedies under Florida law. I believe that such a forced election of forum unfairly prejudiced Ms. Heflin." Accordingly, Commissioner Ballance "dissent[ed] from the majority opinion" and stated that she "would grant Ms. Heflin's Motion for Stay." Ms. Heflin timely appealed to this Court.

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**HEFLIN v. G.R. HAMMONDS ROOFING, INC.**

[201 N.C. App. 365 (2009)]

“In reviewing an opinion and award from the Industrial Commission, the appellate courts are bound by the Commission’s findings of fact when supported by any competent evidence . . . .” *Lanning v. Fieldcrest-Cannon, Inc.*, 352 N.C. 98, 106, 530 S.E.2d 54, 60 (2000). The Commission’s conclusions of law, however, are fully reviewable.

## I

[1] Ms. Heflin’s primary argument on appeal is that the Commission should have ruled on and granted her motion to stay the North Carolina workers’ compensation proceedings so that she could proceed in her tort suit against defendants in Florida. We agree that the Commission erred in failing to address Ms. Heflin’s request for a stay prior to issuing a final determination on the merits of Ms. Heflin’s claim.

Ms. Heflin made her request for a stay in an email dated 21 February 2005. Defendants did not file any response to this request in the Industrial Commission, but in oral argument before this Court argued for the first time that Ms. Heflin’s email should not be considered a proper motion because it was not labeled a “motion” and because Ms. Heflin was not proceeding *pro se*, since the Commission had not yet entered its order allowing her counsel to withdraw. Defendants did not, however, brief this argument, and they have made no attempt to cite any authority suggesting that a motion for a stay must be specifically labeled as such or that Ms. Heflin—whose counsel had moved to withdraw—was prohibited from herself requesting a stay. We, therefore, do not address these arguments.

We note that had defendants, consistent with Rule 609 of the Workers’ Compensation Rules, raised these arguments in a proper response to Ms. Heflin’s request, she could have rectified any problem. It would be unfair to allow defendants to wait until this late date to raise such concerns—especially since the record contains no indication that the Commission had any problem with Ms. Heflin’s email. That email specifically stated: “If you have any questions, please feel free to contact Mr. Zientz . . . .” The email then provided Mr. Zientz’ phone number and email address. The email also asked for confirmation of its receipt.

We, therefore, treat Ms. Heflin’s email request as a motion for a stay that has remained pending before the Commission. It is well established that “it is the duty of the Commission to consider every aspect of plaintiff’s claim whether before a hearing officer or on

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appeal to the full Commission.” *Joyner v. Rocky Mount Mills*, 92 N.C. App. 478, 482, 374 S.E.2d 610, 613 (1988). Here, the Commission failed to rule on a substantive motion pending before it and, therefore, failed to discharge its duty to “consider every aspect of plaintiff’s claim.” *Id.* We agree with the dissenting Commissioner that the failure of the Commission to address Ms. Heflin’s motion for a stay was highly prejudicial to her since it jeopardized her ability to obtain relief in the wrongful death action pending in Florida.

In Florida, when a workers’ compensation claim has been filed, the employer is required by statute to either initiate payment of compensation or file a response to a petition for workers’ compensation benefits within 14 days of receipt of the petition. Fla. Stat. Ann. § 440.192(8) (2007). An employer who fails to initiate payments or respond to the petition is deemed to have denied the claim. *Russell Corp. v. Brooks*, 698 So.2d 1334, 1335 (Fla. Dist. Ct. App. 1997). An employer who denies a workers’ compensation claim is estopped from raising the exclusivity of the workers’ compensation scheme as a defense to a tort suit. *Byerley v. Citrus Pub., Inc.*, 725 So.2d 1230, 1232 (Fla. Dist. Ct. App. 1999). On the other hand, if “the injured party actively pursues and receives workers’ compensation benefits, an election of remedies is found,” and the injured party is limited to workers’ compensation benefits. *Michael v. Centex-Rooney Const. Co.*, 645 So.2d 133, 135 (Fla. Dist. Ct. App. 1994).

Ms. Heflin filed a petition for workers’ compensation benefits in Florida. When defendants failed to respond within 14 days, she voluntarily dismissed the petition and filed a wrongful death action on the basis that the employer was estopped from arguing that workers’ compensation was her exclusive remedy. The Commission’s failure to address Ms. Heflin’s request for a stay and its insistence on continuing with the proceedings, however, gave rise to a risk that Ms. Heflin would be deemed by the Florida courts to have elected the workers’ compensation remedy, thereby precluding her wrongful death action.

In order for there to be an election of remedies, the filing of a workers’ compensation claim, alone, is not enough to preclude a subsequent tort suit. *See Chorak v. Naughton*, 409 So.2d 35, 38 (Fla. Dist. Ct. App. 1981) (“The mere filing of a compensation claim does not preclude an injured party from pursuing common law remedies.”). Instead, “the workers’ compensation remedy must be pursued to a determination or conclusion on the merits . . . .” *Lowry v. Logan*, 650 So.2d 653, 657 (Fla. Dist. Ct. App.), *review denied*, 659 So.2d 1087 (Fla. 1995). Further, Florida courts “hold that mere acceptance by a

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claimant of some compensation benefits is not enough to constitute an election.” *Id.* It appears, therefore, that in order to be barred from bringing a tort suit, the plaintiff must have actively pursued a claim for workers’ compensation to a final determination on the merits. *See Vasquez v. Sorrells Grove Care, Inc.*, 962 So.2d 411, 413 (Fla. Dist. Ct. App. 2007) (explaining that to constitute an election of remedy, “the remedy chosen must be ‘pursued to full satisfaction,’ . . . a phrase that has been interpreted to mean a ‘determination or conclusion on the merits’ ” (quoting *Lowry*, 650 So.2d at 656-57)).

In this case, therefore, Ms. Heflin’s filing of a claim in North Carolina and her acceptance of defendants’ checks would not necessarily result in a finding of an election of the workers’ compensation remedy. Because, however, the Commission did not rule upon Ms. Heflin’s motion for a stay, the case proceeded to a final determination on the merits—an opinion and award declaring the beneficiaries and awarding benefits. We hold that Ms. Heflin was entitled to have her motion for a stay ruled upon before the Commission conducted the hearing sought by defendants and entered a final determination. We, therefore, vacate the opinion and award in this case and remand for a decision on Ms. Heflin’s motion for a stay.

## II

[2] Ms. Heflin also argues that certain of the Commission’s findings are unsupported by competent evidence. Because these issues would not be moot if the Commission decided that the motion to stay should be denied, we address them here.

First, the Commission found that “[d]efendants acknowledged compensability of this claim and requested a hearing to determine dependency.” Defendants concede that they did not file any form specifically for the purpose of admitting compensability of the claim. They argue, however, that their filing of a Form 33 Request for Hearing, in which defendants stated that they were “request[ing] [an] expedited hearing to obtain Order for payment of death benefits” was sufficient to notify Ms. Heflin and the Commission that they were accepting the compensability of the claim.

As support for this proposition, defendants rely on Rule 409(2)(c) of the Workers’ Compensation Rules, which provides that “[i]f an issue exists as to whether a person is a beneficiary under N.C. Gen. Stat. § 97-38, the employer or carrier/administrator and/or any person asserting a claim for benefits may file a Form 33 Request for Hearing

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for a determination by a Deputy Commissioner.” Defendants contend their filing of the Form 33 to determine the proper beneficiaries under this rule signaled to Ms. Heflin and the Commission that they were accepting her claim.

Rule 409, however, must be read in conjunction with the Workers’ Compensation Act. N.C. Gen. Stat. § 97-18(b) (2007) specifically states that when an employer admits the compensability of an injury, “[u]pon paying the first installment of compensation and upon suspending, reinstating, changing, or modifying such compensation for any cause, the insurer shall immediately notify the Commission, on a form prescribed by the Commission, that compensation has begun, or has been suspended, reinstated, changed, or modified.” In *Bailey v. Western Staff Servs.*, 151 N.C. App. 356, 360, 566 S.E.2d 509, 512 (2002), this Court construed this statute to mean that the employer must use an Industrial Commission Form to admit compensability. We reasoned that “[t]he use of the word ‘shall’ in the statute indicates that the use of an Industrial Commission form to admit liability is mandatory.” *Id.* at 360, 566 S.E.2d at 512.

Consequently, defendants were required to notify the Commission of their acceptance of the compensability of Ms. Heflin’s claim by filing the form mandated by the Industrial Commission. The filing of the Form 33 requesting a hearing was not enough. We, therefore, agree with Ms. Heflin that the Commission’s finding that defendants accepted compensability of Ms. Heflin’s claim is not supported by the record.

Next, Ms. Heflin challenges the Commission’s finding that “[d]efendants made payments to Ms. Heflin in the amount of \$41.00 per week (\$82.00 biweekly) from April 2, 2004 and continuing through the present in connection with her North Carolina workers’ compensation claim.” We also agree that this finding is not supported by any competent evidence.

First, defendants did not pay Ms. Heflin weekly or even biweekly starting on 2 April 2004. Instead, Ms. Heflin was sent a check that cleared on 7 April 2005 in the amount of \$2,132.00. Defendants asserted in an exhibit that this check represented payment for the period of 2 April 2004 through 31 March 2005. Subsequently, Ms. Heflin was sent a check that cleared on 1 July 2005 in the amount of \$615.00. This check was reportedly in payment for the period of 25 March to 7 July 2005. After that, Ms. Heflin was paid in increments of \$82.00 every two weeks.

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More significantly, nothing in the record supports the portion of the finding that these payments were “in connection with her North Carolina workers’ compensation claim.” The payments were not pursuant to a Form 60 or any award of compensation. Moreover, defendants did not, on the checks or by any other means, identify these payments as relating to Ms. Heflin’s North Carolina workers’ compensation claim as opposed to Ms. Heflin’s claim in Florida. Therefore, the Commission’s finding that defendants made payments in connection with Ms. Heflin’s North Carolina workers’ compensation claim is unsupported.

Since the Commission’s conclusions of law regarding Ms. Heflin depend upon these findings of fact, we hold that in the event the Commission decides to deny Ms. Heflin’s motion for a stay, it may not simply reinstate the opinion and award. It must instead make new findings of fact, based on the competent evidence, and new conclusions of law based on those findings resolving Ms. Heflin’s claim.

Reversed and remanded.

Judges BRYANT and STEPHENS concur.

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UNION LAND OWNERS ASSOCIATION, AN UNINCORPORATED ASSOCIATION; CRAFT DEVELOPMENT LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY; R.D. HARRELL COMPANY, A NORTH CAROLINA CORPORATION; FAIRVIEW DEVELOPERS, INC., A NORTH CAROLINA CORPORATION, PLAINTIFFS v. THE COUNTY OF UNION, A POLITICAL SUBDIVISION OF THE STATE OF NORTH CAROLINA, DEFENDANT

No. COA09-35

(Filed 8 December 2009)

**Zoning— school impact fees—indirect imposition**

In an action concerning the impact of residential developments on schools, the county’s adoption of an Adequate Public Facilities Ordinance (APFO) that included a Voluntary Mitigation Payment (VMP) and similar measures was in excess of its statutory authority. Defendant may not use the APFO to obtain indirectly the payment of what amounts to an impact fee given that defendant lacks the authority to impose school impact fees directly.

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[201 N.C. App. 374 (2009)]

Appeal by plaintiffs from an order entered 24 September 2008 by Judge Christopher M. Collier in Union County Superior Court. Heard in the Court of Appeals 10 June 2009.

*Burns, Day & Presnell, P.A., by Daniel C. Higgins and James J. Mills, for plaintiffs-appellants.*

*Perry, Bundy, Plyler & Long, L.L.P., by H. Ligon Bundy and Melanie D. Cox, and White & Smith, LLC, by S. Mark White, for defendant-appellee.*

*Tharrington Smith, L.L.P., by Deborah R. Stagner, and General Counsel Allison B. Shafer, for North Carolina School Boards Association, Amicus Curiae.*

*General Counsel James B. Blackburn, III for North Carolina Association of County Commissioners and Poyner Spruill LLP by Robin Tatum Currin and Chad W. Essick for North Carolina Association of County Commissioners and International Municipal Lawyers Association, Amici Curiae.*

*Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Craig D. Justus, for North Carolina Home Builders Association, North Carolina Association of Realtors, and Piedmont Public Policy Institute; General Counsel J. Michael Carpenter for North Carolina Home Builders Association; and Counsel Richard A. Zechini for North Carolina Association of Realtors, Amici Curiae.*

JACKSON, Judge.

Union Landowners Association, Craft Development LLC, R.D. Harrell Company, and Fairview Developers, Inc. (“plaintiffs”) appeal from the trial court’s order granting summary judgment for Union County (“defendant”). For the following reasons, we reverse and remand.

In 1998, 2000, and 2005, defendant sought authority from the North Carolina General Assembly to impose school impact fees upon developers in Union County. Each attempt failed. After the failure of the most recent attempt to obtain legislative action, defendant initiated plans for a subdivision development approval moratorium, which allowed defendant time to draft the Adequate Public Facilities Ordinance (“APFO”).

On 2 October 2006, defendant amended the Union County Land Use Ordinance by adopting the APFO and a resolution establishing a

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procedure for calculating the amount of a Voluntary Mitigation Payment ("VMP"). The APFO provides county planners and developers with a methodology for evaluating the impact of proposed residential developments on schools within unincorporated areas of Union County. Ultimately, the APFO methodology is intended to assist defendant in determining whether to issue or deny development permits.

The size of the proposed development and estimated school capacities are two factors considered during the evaluation of a proposed development. If a proposed development's impact would not overburden the capacity of schools serving the development, the proposal is approved without additional consideration. However, if the impact would overburden the capacity of schools serving the development, the proposal is denied outright or approved subject to compliance with certain conditions intended to mitigate the impact on school capacity issues.

These conditions include: (1) deferring approval for five years; (2) postponing development until school capacity becomes available; (3) scheduling the development to match the rate of school capacity growth; (4) redesigning the proposed development to reduce the impact on school capacity; (5) requesting minor plat approval so as to exempt the proposed development from APFO conditions; (6) offsetting any excess impact on school capacity resulting from the proposed development by providing a VMP to the County; (7) constructing school facilities to offset the proposed development's impact in excess of estimated school capacity; or (8) satisfying, with defendant's approval, other reasonable conditions offsetting the proposal's impact on the capacity of schools serving the proposed development. Union County, N.C., Union County Land Use Ordinance art. XXIII §§ 363, 366, 372 (2006).

On 1 December 2006, plaintiffs brought an action against defendant, requesting that the trial court, *inter alia*, (1) declare the APFO null and void as being unlawful and *ultra vires*; (2) order defendant to refund fully any and all fees paid by plaintiffs pursuant to the APFO, including, but not limited to, VMPs, with interest; and (3) enjoin defendant and defendant's agents from enforcing the APFO and from refusing to approve developments and other permits based upon the APFO. On 22 February 2007, plaintiffs filed an amended complaint, adding a discrimination claim seeking declaratory relief pursuant to section 1983 of title 42 of the United States Code.

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On 7 August 2008, defendant filed a motion for summary judgment. On 8 August 2008, plaintiffs filed a motion for summary judgment. On 15 August 2008, plaintiffs filed objections and a motion to strike.

The trial court conducted a hearing on the cross-motions for summary judgment, objections, and motion to strike on 18 August 2008. Subsequently, plaintiffs amended their objections and motion to strike, and defendant filed objections and a motion to strike. On 24 September 2008, the trial court entered its order granting defendant's motion for summary judgment and declaring that the APFO was within defendant's delegated authority and constitutional. The trial court denied plaintiffs' motion for summary judgment and plaintiffs' objections and motion to strike. Plaintiffs appeal.

There is no dispute as to any genuine issue of material fact in this appeal. Accordingly, the standard of review of the trial court's grant of summary judgment to defendant is *de novo*. See *BellSouth Telecomms., Inc. v. City of Laurinburg*, 168 N.C. App. 75, 80, 606 S.E.2d 721, 724 (2005) (review of trial court summary judgment order based solely upon issues of law is *de novo*).

Plaintiffs argue that the trial court erred in granting defendant's motion for summary judgment and in denying plaintiffs' motion for summary judgment on the ground that no statutory authority enabled defendant to adopt the APFO. We agree.

Plaintiffs contend that the North Carolina General Assembly neither expressly nor impliedly authorized defendant to adopt the APFO via statute. In response, defendant contends that three sources of statutory authority exist for adopting ordinances such as the APFO: (1) statutes relating to the county police power, (2) zoning statutes, and (3) subdivision statutes.

At its core, this case turns on what actions the General Assembly has authorized defendant to take in regulating zoning and managing subdivision development. We recognize the existence of serious issues associated with overcrowding in the school system and with the provision of adequate educational facilities to address these issues and further recognize that those issues also affect the public welfare. Defendant asks this Court to construe broadly the county's police power in section 153A-121, its zoning power in sections 153A-340 and 153A-341, and its subdivision regulation power in section 153A-330 *et seq.* of the North Carolina General Statutes as

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authorizing the adoption of the APFO and VMP. However, we do not believe that these statutes provide authority for the implementation of the APFO.

Defendant first contends that defendant's general police power provides authority to adopt the APFO. Pursuant to its police powers, "[a] county may by ordinance define, regulate, [or] prohibit . . . acts . . . or conditions detrimental to the health, safety, or welfare of its citizens[.]" N.C. Gen. Stat. § 153A-121(a) (2005). The police power allows restricting uses of property when the legislative body reasonably believes that in so doing it will promote the most appropriate use of the restricted property and will conserve the values of other properties. *Blades v. City of Raleigh*, 280 N.C. 531, 546, 187 S.E.2d 35, 43 (1972) (citations omitted). However, the General Assembly has enacted the zoning and subdivision regulation statutes for the purposes of delineating the authority of county governments to regulate the development of real estate. For that reason, we believe that defendant correctly has tied the APFO to its zoning and subdivision regulation authority and that North Carolina General Statutes, section 153A-121 does not provide an independent source of authority for the APFO. Any contrary decision would eviscerate existing limitations on defendant's zoning and subdivision regulation authority. Thus, we must look to the zoning and subdivision regulation ordinances to ascertain if the General Assembly has authorized defendant to implement the APFO.

We believe that Professor David W. Owens of the School of Government at the University of North Carolina has explained the distinction between zoning and subdivision ordinances clearly. "The basic principle of zoning is simple: zoning creates a number of different districts, or 'zones,' in a city or county, each of which sets specific rules on *how the land in that district can be used*." David W. Owens, Introduction to Zoning 3 (3d ed. 2007) (emphasis added). In contrast, a subdivision ordinance seeks to "regulate the creation of new lots or separate parcels of land." *Id.* at 129.

Defendant contends that legislatively granted zoning powers provide authority to adopt the APFO. " 'Statutory interpretation properly begins with an examination of the plain words of the statute.' " *Three Guys Real Estate v. Harnett County*, 345 N.C. 468, 472, 480 S.E.2d 681, 683 (1997) (quoting *Correll v. Division of Social Services*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992)). Section 153A-340(a) of the North Carolina General Statutes provides:

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For the purpose of promoting health, safety, morals, or the general welfare, a county may adopt zoning and development regulation ordinances. . . . A zoning ordinance may regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lots that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes.

N.C. Gen. Stat. § 153A-340(a) (2005). Further, pursuant to section 153A-341,

[zoning] regulations may address, among other things, the following public purposes: . . . to prevent the overcrowding of land; to avoid undue concentration of population; to lessen congestion in the streets; . . . and to facilitate the efficient and adequate provision of . . . schools . . . and other public requirements. The regulations shall be made . . . with a view to . . . encouraging the most appropriate use of land throughout the county. . . . In addition, the regulations shall be made with reasonable consideration to expansion and development of any cities within the county, so as to provide for their orderly growth and development.

N.C. Gen. Stat. § 153A-341 (2005). Where, as here, “multiple statutes address a single subject, this Court construes them *in pari materia* to determine and effectuate the legislative intent.” *Brown v. Flowe*, 349 N.C. 520, 523-24, 507 S.E.2d 894, 896 (1998) (citing *Bd. of Adjmt. of the Town of Swansboro v. Town of Swansboro*, 334 N.C. 421, 427, 432 S.E.2d 310, 313 (1993)).

Section 153A-340 provides the legislative grant of zoning power to defendant, enumerating specific elements defendant is allowed to regulate and restrict. Section 153A-341 lists legislative objectives for defendant's use of the zoning power. Included within the list is facilitation of the efficient and adequate provision of schools. However, when construed *in pari materia*, defendant's implementation of those legislative objectives are subject to “the limitations of the enabling act.” *Nash-Rocky Mount Bd. of Educ. v. Rocky Mount Bd. of Adjust.*, 169 N.C. App. 587, 589, 610 S.E.2d 255, 258 (2005) (quoting *Allred v. City of Raleigh*, 277 N.C. 530, 540, 178 S.E.2d 432, 437-38 (1971)). In other words, although defendant is entitled to use its zoning authority to facilitate the efficient and adequate provision of schools, it must achieve this goal using the tools authorized by the

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zoning statute. While defendant clearly seeks to pursue the legislative objective of facilitating the efficient and adequate provision of schools, the APFO does not utilize any of the zoning powers enumerated in section 153A-340. Therefore, the ordinance falls outside of defendant's legislatively granted zoning powers.

Defendant also contends that legislatively granted subdivision powers provide authority to adopt the APFO. The "power to regulate subdivisions is authorized and controlled by [North Carolina General Statutes, sections] 153A-330 through -335." *Three Guys Real Estate*, 345 N.C. at 472, 480 S.E.2d at 683. One statute that defendant suggests allows for the adoption of the APFO provides, "A county may by ordinance regulate the subdivision of land within its territorial jurisdiction." N.C. Gen. Stat. § 153A-330 (2005). Additionally, the subdivision ordinances generally "provide for the orderly growth and development of the county . . . in a manner that will avoid congestion and overcrowding and will create conditions that substantially promote public health, safety, and the general welfare." N.C. Gen. Stat. § 153A-331(a) (2005). Nevertheless, "[c]ounties . . . have no inherent legislative powers. They are instrumentalities of state government and possess only those powers the General Assembly has conferred upon them." *Five C's, Inc. v. County of Pasquotank*, 195 N.C. App. 410, 413, 672 S.E.2d 737, 740 (2009) (quoting *Craig v. County of Chatham*, 356 N.C. 40, 44, 565 S.E.2d 172, 175 (2002)).

Section 153A-331(c) of the North Carolina General Statutes specifically provides "for the more orderly development of subdivisions by requiring the construction of community service facilities in accordance with county plans" and "for the reservation of school sites in accordance with comprehensive land use plans approved by the board of commissioners or the planning board." However, nowhere within sections 153A-330 through 153A-335 does the General Assembly authorize defendant to adopt a land use regulation ordinance pursuant to which a developer may be forced to make a payment of money, donate land, or provide for school construction. As we previously have stated, "[f]oremost, the duty of providing adequate school facilities is a duty of the County itself[.]" *Durham Land Owners Ass'n v. County of Durham*, 177 N.C. App. 629, 634, 630 S.E.2d 200, 204 (2006). In *Durham Land Owners*, this Court held that Durham County could not shift the financial responsibility for funding school construction to new developments by using a school impact fee. *Id.* at 636-37, 630 S.E.2d at 205. Here, authors of the APFO and VMP clearly worked in good faith, using their best efforts to draft

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an ordinance that would operate within defendant's statutorily-granted authority. However, as with the use of school impact fees in *Durham Land Owners*, defendant uses the APFO, which uses a VMP and other similar measures, to shift impermissibly a portion of the burden for funding school construction onto developers seeking approval for new developments.

Defendant may not use the APFO to obtain indirectly the payment of what amounts to an impact fee given that defendant lacks the authority to impose school impact fees directly. Therefore, because our Constitution places the duty to fund public schools on the General Assembly and local governments and because the General Assembly has neither expressly nor impliedly authorized defendant to shift that duty using subdivision ordinances that impose fees or use similar devices upon developers of new construction, we hold that defendant's adoption of an APFO that includes a VMP and similar measures was in excess of its statutory authority. We reverse and remand to the trial court for entry of an order consistent with this opinion.

As our holding as to plaintiffs' first argument is dispositive, we need not address the remaining arguments regarding whether the APFO represents a *de facto* moratorium, violates equal protection clauses, acts as an unlawful tax, or acts as an unlawful taking.

Reversed and remanded.

Judges McGEE and ERVIN concur.

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STATE OF NORTH CAROLINA v. JAMES BERNARD HENDERSON, DEFENDANT

No. COA08-1409

(Filed 8 December 2009)

**1. Sentencing— prior record level—failure to show substantial similarity of out-of-state convictions**

The trial court erred in a rape, burglary, kidnapping, and sexual offense case by sentencing defendant as a level IV offender and the case was remanded for resentencing. The State failed to demonstrate to the trial court the substantial similarity

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between defendant's out-of-state convictions and North Carolina crimes and the Court of Appeals lacked the information necessary to conduct its own substantial similarity analysis for harmless error purposes.

**2. Appeal and Error— preservation of issues—statute inapplicable at time offenses committed**

Defendant's arguments regarding his probation or parole violation based upon N.C.G.S. §§ 15A-1022.1(c), -1340.16(a5), and (a6) were dismissed as none of these statutory subsections were in effect at the time defendant committed his offenses, and defendant failed to make any argument that the trial court erred under the proper statutes applicable to his offenses.

Appeal by defendant from judgments entered on or about 8 February 2008 by Judge Henry W. Hight, Jr. in Superior Court, Wake County. Heard in the Court of Appeals 6 May 2009.

*Attorney General Roy A. Cooper, III, by Assistant Attorney General Catherine F. Jordan, for the State.*

*Russell J. Hollers, III, for defendant-appellant.*

STROUD, Judge.

Defendant was convicted by a jury of rape, burglary, kidnapping, and sexual offense. Defendant appeals, arguing that the trial court erred in sentencing him as a level IV offender. For the following reasons, we remand for resentencing.

**I. Background**

The State's evidence tended to show that in September of 1999, Lisa returned home from a weekend away and noticed that "[her] lamp wouldn't turn on, and [her] apartment was wet, and [her] bed was kind of shifted[.]" Lisa discovered that her lamp was unplugged. Lisa put her sheets into the washing machine. Lisa then lay on her couch and watched TV. Lisa fell asleep and later awoke upon hearing movement of the blinds on her sliding glass door. Lisa saw "a man coming in [her] apartment with a gun."

Defendant grabbed Lisa, "held a gun to [her] head[.]" and asked her for money. Defendant told Lisa "that the reason why he's doing this is because [her] forefathers raped and killed his people and forced them into slavery[.]" Lisa gave defendant her purse and

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informed him she did not have any money. Defendant pushed Lisa down and took off her clothes. Defendant put his finger in Lisa's vagina. Defendant then raped Lisa. Defendant requested more money and Lisa gave him her credit cards. Before leaving, defendant told Lisa "that if he saw anything in the news or if the police arrived, that he knew where [her] family lived and that he would kill them." After defendant left, Lisa called her parents and the police. Lisa was taken to the hospital, where she was interviewed by a detective and examined by a nurse, who took vaginal swabs. The DNA on Lisa's vaginal swab matched defendant's DNA.

On or about 14 May 2007, defendant was indicted for first degree rape, first degree burglary, first degree kidnapping, and first degree forcible sexual offense. Defendant was found guilty by a jury on all four charges. The trial court determined that defendant had a prior record level of IV and sentenced him to consecutive sentences of 384 to 469 months on the rape conviction, 117 to 150 months on the burglary conviction, 46 to 65 months on the kidnapping conviction, and 384 to 469 months on the forcible sexual offense conviction. Defendant appeals, arguing that the trial court erred in sentencing him as a level IV offender. For the following reasons, we remand for resentencing.

## II. Record Level

**[1]** Defendant argues that the trial court erred in sentencing him as a record level IV offender because (1) "the State did not prove that [defendant]'s out-of-state convictions were for offenses substantially similar to any North Carolina offenses" and (2) "there was insufficient evidence that [defendant] was on probation or parole at the time of the offense." (Original in all caps.)

### A. Substantially Similar Offenses

During sentencing the following dialogue took place:

THE COURT: . . . The state prepared to proceed to sentencing?

MR. CRUDEN [State's attorney]: We are, judge. I have a worksheet which I relayed to the Court earlier, and that you've heard in the testimony, the defendant had prior convictions in Pennsylvania in 1989.

The most serious conviction would be the two counts of armed robbery, Class D felony.

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He had the unauthorized use of a motor vehicle in '88 in Pennsylvania, and the domestic violence conviction in South Carolina 2002.

And then based on his testimony yesterday when he testified he was on probation or post-release supervision when these offenses occurred, there is an additional point for that, so we would contend he has nine points, he's a record Level IV for sentencing. I gave the defendant notice of that after the testimony yesterday.

THE COURT: Does the defendant stipulate that he would have nine prior record level points, therefore for sentencing purposes he would be a record Level IV?

MR. PRESNELL [defendant's attorney]: Yes, sir.

Based upon the sentencing worksheet and defendant's stipulation, the trial court assigned defendant six points for a prior conviction for a Class D felony based upon a 2 March 1989 Pennsylvania conviction for robbery and one point each for two prior convictions of a Class A1 or Class 1 misdemeanor based upon a 23 September 2002 South Carolina conviction for domestic violence and a 14 December 1988 Pennsylvania conviction for unauthorized use of a motor vehicle, for a total of eight points based upon prior convictions. The trial court also assigned one point based upon a finding that "the offense was committed . . . while on supervised or unsupervised probation, parole, or post-release supervision[.]"

Defendant contends that his concession to nine prior record level points and a record level of IV "did not relieve the state of its burden of proving that the out-of-state offenses were substantially similar to any North Carolina crimes."

Defendant claims that

[i]n the present case, the state did not present the trial court with any evidence that the out-of-state offenses were substantially similar to any North Carolina offenses, misdemeanor or felony. The state did not provide the trial court with the South Carolina or Pennsylvania statutes. The state did not present the trial court with any North Carolina statutes that it contended resembled the out-of-state offenses. The state did not even name any North Carolina offense when arguing that "Domestic Violence" was similar to a North Carolina Class 1 or

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A1 misdemeanor. The only evidence the state offered regarding the Pennsylvania offenses was their titles, “Unath Use MV” and “Robbery”.

N.C. Gen. Stat. § 15A-1340.14(e) provides,

Except as otherwise provided in this subsection, a conviction occurring in a jurisdiction other than North Carolina is classified as a Class I felony if the jurisdiction in which the offense occurred classifies the offense as a felony, or is classified as a Class 3 misdemeanor if the jurisdiction in which the offense occurred classifies the offense as a misdemeanor. If the offender proves by the preponderance of the evidence that an offense classified as a felony in the other jurisdiction is substantially similar to an offense that is a misdemeanor in North Carolina, the conviction is treated as that class of misdemeanor for assigning prior record level points. If the State proves by the preponderance of the evidence that an offense classified as either a misdemeanor or a felony in the other jurisdiction is substantially similar to an offense in North Carolina that is classified as a Class I felony or higher, the conviction is treated as that class of felony for assigning prior record level points. If the State proves by the preponderance of the evidence that an offense classified as a misdemeanor in the other jurisdiction is substantially similar to an offense classified as a Class A1 or Class 1 misdemeanor in North Carolina, the conviction is treated as a Class A1 or Class 1 misdemeanor for assigning prior record level points.

N.C. Gen. Stat. § 15A-1340.14(e) (1999).

This Court has determined that calculating an offender’s prior record level, when an offender has out-of-state offenses, is a mixed question of fact and law, which requires comparison of the relevant statutes describing the North Carolina crimes with those of the state where defendant was convicted. *See State v. Hanton*, 175 N.C. App. 250, 254-55, 623 S.E.2d 600, 604 (2006).

[W]hether an out-of-state offense is substantially similar to a North Carolina offense is a question of law that must be determined by the trial court, not the jury. Determining a defendant’s prior record [level] involves a complicated calculation of rules and statutory applications. This calculation is a mixed question of law and fact. The fact is the fact of the conviction, which under *Blakely* is not a question for a jury. The law is the proper appli-

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cation of the law to the fact of a defendant's criminal record, which often involves, as the present case does, comparing the elements of a defendant's prior convictions under the statutes of foreign jurisdictions with the elements of crimes under North Carolina statutes. The comparison of the elements of an out-of-state criminal offense to those of a North Carolina criminal offense does not require the resolution of disputed facts. Rather, it involves statutory interpretation, which is a question of law.

*Id.* (citations, quotation marks, and brackets omitted).

This Court has also explained that a defendant's stipulation to an out-of-state felony conviction is sufficient to support treating the felony conviction as a Class I felony, but the stipulation alone is not sufficient to support a higher classification for sentencing purposes. *See State v. Bohler*, — N.C. App. —, —, —, S.E.2d —, — (Aug. 4, 2009 COA08-1515)

In *State v. Hinton*, — N.C. App. —, 675 S.E.2d 672, 675 (2009), this Court expressly differentiated between the validity of a stipulation to the existence of any of the convictions listed on the prior record level worksheet and the assignment of points to his prior convictions in New York. In light of this conclusion, we specifically stated that:

According to the statute, the default classification for out-of-state felony convictions is Class I. Where the State seeks to assign an out-of-state conviction a more serious classification than the default Class I status, it is required to prove by the preponderance of the evidence that the conviction at issue is substantially similar to a corresponding North Carolina felony. However, where the State classifies an out-of-state conviction as a Class I felony, no such demonstration is required. Unless the State proves by a preponderance of the evidence that the out-of-state felony convictions are substantially similar to North Carolina offenses that are classified as Class I felonies or higher, the trial court must classify the out-of-state convictions as Class I felonies for sentencing purposes.

Thus, while the trial court may not accept a stipulation to the effect that a particular out-of-state conviction is substantially similar to a particular North Carolina felony or misdemeanor, it may accept a stipulation that the defendant in question has been convicted of a particular out-of-state offense and that

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this offense is either a felony or a misdemeanor under the law of that jurisdiction.

*Id.* (citations, quotation marks, and brackets omitted).

Thus, though defendant could and did stipulate to the existence of his out-of-state convictions, and he could stipulate that they were felonies or misdemeanors, *id.*, he *could not* stipulate to a question of law, i.e., whether “the State prove[d] by the preponderance of the evidence that an offense classified as either a misdemeanor or a felony in the other jurisdiction is substantially similar to an offense in North Carolina . . . .” N.C. Gen. Stat. § 15A-1340.14(e); *Bohler* at —, — S.E.2d at —; *see also State v. Prevette*, 39 N.C. App. 470, 472, 250 S.E.2d 682, 683 (citations omitted), *disc. review denied and appeal dismissed*, 297 N.C. 179, 254 S.E.2d 38 (1979) (“The State and defendants attempted to stipulate as to a question of law. Stipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate. This rule is more important in criminal cases, where the interests of the public are involved. The due administration of the criminal law cannot be left to the stipulations of the parties.” (citations omitted)).

The State argues that defendant is not entitled to a new sentencing hearing because any error in the calculation of his prior record level was harmless. However, we cannot say that there is not a reasonable possibility that, but for the trial court’s error, defendant would not have been sentenced at a lower prior record level. For example, defendant’s Pennsylvania robbery conviction was treated as a Class D felony, for which six record points were assigned, instead of a Class I felony conviction, for which two record points would have been assigned. *See* N.C. Gen. Stat. § 15A-1340.14(e). Defendant’s South Carolina domestic violence conviction and Pennsylvania unauthorized use of a motor vehicle conviction were treated as Class A1 or 1 misdemeanors, with one point each, instead of Class 3 misdemeanors, for which no points would have been assigned. *See id.* If the trial court had assigned points based on the “default” levels of two points for the robbery conviction and no points for the other convictions, due to the absence of an adequate substantial similarity showing, defendant would have had only two points based upon prior convictions, and he would have been a prior record level II, instead of IV, for sentencing purposes. *See id.*

The State also argues on appeal that any trial court error was harmless and that defendant’s out-of-state convictions are substan-

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tially similar to specific North Carolina offenses. In advancing this argument, the State identifies in its brief the statutes under which it contends that defendant was convicted in South Carolina and Pennsylvania and argues that these statutes establish the necessary substantial similarity. The State did not identify these South Carolina and Pennsylvania statutes during sentencing before the trial court or in the record on appeal. The State may be correct in its contentions regarding each of these offenses, but it is not the proper role of this Court to engage in that determination in this case as neither we nor the trial court were presented with the necessary facts to make such a determination. *See, e.g., State v. Palmateer*, 179 N.C. App. 579, 581, 634 S.E.2d 592, 593 (2006) (remanding to the trial court for resentencing) (citation omitted)). The out-of-state crimes were not identified by statutes in the record, but instead only by brief and non-specific descriptions, especially “robbery” and “domestic violence,” which could arguably describe more than one specific South Carolina and Pennsylvania crime. Although we recognize that it may be possible for a record to contain sufficient information regarding an out-of-state conviction for this Court to determine if it is substantially similar to a North Carolina offense, the record before us does not. Accordingly, we will not speculate as to whether the State has for the first time, in its brief on appeal, properly identified the out-of-state statutes for comparison.

Therefore, since the State failed to demonstrate to the trial court the substantial similarity of defendant’s out-of-state convictions to North Carolina crimes which would carry the sentencing points as assigned by the trial court and because we lack the information necessary to conduct our own substantial similarity analysis for harmless error purposes, we must remand for resentencing. *See Palmateer* at 581, 634 S.E.2d at 593. At the resentencing hearing, the trial court may consider additional information presented by the State or by defendant regarding defendant’s prior offenses.

**B. Probation or Parole**

[2] Defendant also argues that the trial court improperly assigned him an additional point for being on probation or parole at the time of the offenses. Defendant contends that “the state did not provide [him] with the proper notice that it intended to have the trial court add a point to his record for being on parole in September 1999” pursuant to N.C. Gen. Stat. § 15A-1340.16(a6). Defendant further argues pursuant to N.C. Gen. Stat. § 15A-1340.16(a5) that “the trial court erred by failing to impanel a jury to determine whether [de-

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fendant] was on probation in September 1999.” Lastly, defendant argues that “the trial court erred by failing to conduct a formal plea colloquy regarding the probation point” in violation of N.C. Gen. Stat. § 15A-1022.1(c).

All of defendant’s arguments regarding his probation or parole violation are based upon N.C. Gen. Stat. §§ 15A-1022.1(c), -1340.16(a5), and (a6). However, none of these statutory subsections were in effect at the time defendant committed his offenses. North Carolina Session Law 2005-145, which refers to N.C. Gen. Stat. §§ 15A-1022.1, -1340.16(a5), and (a6), provides,

This act is effective when it becomes law. *Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act*, and the statutes that would be applicable but for this act remain applicable to those prosecutions.

....

Became law upon approval of the Governor at 2:50 p.m. on the 30th day of June, 2005.

2005 N.C. Sess. Laws ch. 145, § 5 (emphasis added).

As defendant’s offenses were committed in 1999, he cannot raise arguments on appeal based upon N.C. Gen. Stat. §§ 15A-1022.1(c), -1340.16(a5), and (a6). *See id.*, *see also State v. Everette*, 361 N.C. 646, 656, 652 S.E.2d 241, 247-48 (2007) (“The remedial measures our legislature enacted in the wake of *Blakely* remain in full force when applicable, but we summarily reject defendant’s suggestion that we should retroactively engraft these statutory protections onto the federal *Blakely* right under the guise of constitutional interpretation. Accordingly, for those cases arising prior to the effective date of the *Blakely Act* [, N.C. Gen. Stat. § 15A-1022.1], we reaffirm our prior cases and follow the federal courts in holding that defense counsel’s admissions to the existence of an aggravating factor constitute *Blakely*-compliant admissions upon which an aggravated sentence may be imposed.”). As defendant has failed to make any argument that the trial court erred under the proper statute as applicable to his 1999 offenses, this assignment of error is overruled.

## III. Conclusion

We conclude that the trial court erred by assigning nine prior record level points to defendant based upon his out-of-state convic-

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tions, as the State failed to present evidence regarding a substantial similarity between defendant's out-of-state convictions and North Carolina offenses. Accordingly, we remand for resentencing as to defendant's out-of-state offenses.

REMANDED.

Judges ELMORE and ERVIN concur.

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IN RE: APPEAL FROM THE ORDER SANCTIONING BENJAMIN SMALL,  
ATTORNEY AT LAW

No. COA09-485

(Filed 8 December 2009)

**1. Attorneys; Pleadings— sanctions—filing motions in violation of court rules and for improper purpose**

The superior court did not err by ordering respondent attorney to pay \$500 as a sanction for filing motions in violation of court rules because respondent did not challenge any of the court's findings of fact that served as the bases for its decision to sanction him and conceded that the trial court had the inherent authority to sanction him.

**2. Constitutional Law— due process—notice**

The Court of Appeals exercised its discretion under N.C. R. App. P. 2 and concluded that respondent attorney's due process rights were not violated where respondent was put on notice that sanctions may be imposed for filing his motions to recuse and continue, had notice of the grounds upon which those sanctions were imposed against him, and had an opportunity to address those grounds throughout the entire hearing on defendant's motions.

Appeal by respondent from order entered 18 December 2008 by Judge W. Erwin Spainhour in Cabarrus County Superior Court. Heard in the Court of Appeals 7 October 2009.

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*Roy Cooper, Attorney General, by Grady L. Balentine, Jr.,  
Special Deputy Attorney General, for the State.*

*Michael E. Casterline, for respondent-appellant.*

MARTIN, Chief Judge.

Attorney Benjamin S. Small appeals from an order entered in Cabarrus County Superior Court which ordered him to pay \$500 as a sanction for filing motions that the trial court found were filed in violation of court rules and were “vexatious and totally without merit and . . . filed for the improper purpose of harassing [the ADA].” For the reasons stated, we affirm.

Small was appointed to serve as counsel for defendant James Neal Halley, Jr., who was charged with the Class C felonious offense of child abuse resulting in serious bodily injury in violation of N.C.G.S. § 14-318.4(a3). On 26 November 2008, on behalf of defendant Halley, Small filed a Motion to Recuse for Conduct Prejudicial to the Administration of Justice (“Motion to Recuse”) in which he sought to recuse the Office of the District Attorney from further proceedings related to the prosecution of defendant Halley. The motion alleged, in part, that the Office of the District Attorney made allegations against defendant Halley without probable cause and failed to disclose evidence in violation of several North Carolina Rules of Professional Conduct, and thus “demonstrate[d] a lack of professional objectivity, an abuse of prosecutorial discretion, and the pursuit of a conviction rather than the pursuit of justice for the [d]efendant.” On 4 December 2008, Small filed a Motion to Continue in which he sought to continue defendant Halley’s case—set for trial just over a month later on 19 January 2009—so that he could attend a continuing legal education program on 21-23 January 2009.

The State filed responses to each of defendant’s motions. The State’s Response to defendant’s Motion to Recuse alleged that “defense counsel is merely being vindictive by filing this frivolous Motion since this [ADA] will not agree to the counteroffer and defense counsel is therefore acting unprofessionally, unethically and not in the best interest of his client.” The State also alleged that “defense counsel has become too personally involved in this case to the extent that all reasonableness and professionalism has been skewed.” After alleging that Small had violated Rules 3.3(1), 4.1(1), and 8.4 of the Rules of Professional Conduct, the State requested, among other things, that: (1) “defense counsel be removed from the

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court-appointed list until such time as this Court finds that defense counsel can conduct himself in a professional, objective and rationale [sic] manner in representing his clients” and (2) “defense counsel be sanctioned for blatant violations of [Rules of Professional Conduct] 3.3(1), 4.1(1) and 8.4.”

The State’s Response to defendant’s Motion to Continue alleged that, on 23 September 2008, the State notified Small that defendant’s trial was set to begin on 19 January 2009. Since Small did not file his Designation of Secure Leave until 4 December 2008, the State further alleged that Small did not comply with Rule 26(F)(1)-(2) of the General Rules of Practice for the Superior and District Courts, which requires that designations for secure leave shall be filed no later than 90 days before the beginning of the secure leave period and before any trial has been regularly scheduled. Accordingly, the State requested that “defense counsel [Small] be sanctioned for failing to disclose” to the trial court that he was notified of the 19 January 2009 trial date on 23 September 2008 and not on 12 November 2008, as Small alleged in his motion.

On 18 December 2008, the trial court conducted a hearing in which it considered defendant’s motions and the State’s responses to those motions. On the same day, the trial court entered an order in which it made the following findings of fact and conclusions of law, none of which are challenged on appeal:

7. On 4 December 2008 counsel for the defendant filed a Designation of Secure Leave for the dates of 21-23 January 2009. The filing of this secured leave designation by counsel was in violation of the statutes and rules that require such designations to be filed no later than 90 days before the beginning of the leave period *and* before any trial has been noticed for trial during the secure leave period.
8. The defendant’s Motion to Recuse is vexatious and totally without merit and was filed for the improper purpose of harassing [the ADA].
9. There is no factual basis for the contention that the [ADA] has violated any of the Rules of Professional Conduct. Indeed, all of the evidence available to this court points to the fact that the she [sic] has properly discharged her duties in accordance with the law. She has prepared the case for trial after evaluating all of the available evidence, extended a plea offer to the

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defendant (that she was not required by law to do) which has been rejected by the defendant, provided discovery to the defendant's attorney and she has scheduled the case for trial within the period initially requested by the attorney for the defendant in his motion for speedy trial. Merely because the defendant's attorney disagrees with the assistant district attorney as to the strength of the State's case is no indication whatsoever that the assistant district attorney is guilty of professional misconduct. If the State fails to offer evidence sufficient to submit the case to the jury, then the defendant's remedy is to move the trial court for dismissal at the close of the State's evidence—not to attempt to recuse the district attorney and her staff.

Based on the foregoing Findings of Fact, the court makes the following [Conclusions of Law]:

1. The defendant has filed a motion to recuse . . . . There is no basis in law or in fact for this motion. There is no evidence of any actual conflict of interest on the part of the district attorney, or any member of her staff. There is no evidence before this court to indicate that the defendant will be unfairly prosecuted in this case. . . .
2. This court has the inherent authority to sanction an attorney who signs and files a pleading without any factual or legal basis whatever and that is vexatious, as in this case. Accordingly, the defendant's attorney, should be sanctioned as hereinafter ordered.

The court then denied defendant's Motions to Recuse and Continue, and ordered that Small pay \$500 on or before 31 March 2009 "as a sanction in this matter." On 19 December 2008, Small filed a Notice of Appeal from the trial court's order.

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[1] "All courts are vested with inherent authority to do all things that are reasonably necessary for the proper administration of justice." *Couch v. Private Diagnostic Clinic*, 146 N.C. App. 658, 665, 554 S.E.2d 356, 362 (2001) (internal quotation marks omitted), *appeal dismissed and disc. review denied*, 355 N.C. 348, 563 S.E.2d 562 (2002). Consequently, a court has the "inherent power to deal with its attorneys." *Id.* "This power is based upon the relationship of the attorney to the court and the authority which the court has over its own officers to prevent them from, or punish them for, acts of dis-

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honesty or impropriety calculated to bring contempt upon the administration of justice.” *In re Nw. Bonding Co.*, 16 N.C. App. 272, 275, 192 S.E.2d 33, 35, *cert. denied and appeal dismissed*, 282 N.C. 426, 192 S.E.2d 837 (1972). Moreover, it is well recognized that “a Superior Court, as part of its inherent power to manage its affairs, to see that justice is done, and to see that the administration of justice is accomplished as expeditiously as possible, has the authority to impose reasonable and appropriate sanctions upon errant lawyers practicing before it.” *In re Robinson*, 37 N.C. App. 671, 676, 247 S.E.2d 241, 244 (1978), *on reh’g*, 39 N.C. App. 345, 250 S.E.2d 79 (1979); *see also Ivarsson v. Off. of Indigent Def. Servs.*, 156 N.C. App. 628, 632, 577 S.E.2d 650, 653, *disc. review denied*, 357 N.C. 250, 582 S.E.2d 269 (2003) (“[T]he judiciary holds the power to supervise, punish and regulate the attorneys that appear before it.”). This “inherent power of the court to discipline attorneys [also] includes the imposition of monetary sanctions.” *Couch*, 146 N.C. App. at 666, 554 S.E.2d at 363 (citing *Robinson*, 37 N.C. App. at 676, 247 S.E.2d at 244).

In the present case, Small concedes that “[t]here is no question courts have inherent authority over attorneys as officers of the court” “to take disciplinary action against attorneys practicing therein,” (internal quotation marks omitted), and does not dispute that the trial court had the power to sanction him pursuant to its inherent authority. However, Small claims that the trial court did not impose its sanction pursuant to its inherent authority, but rather imposed its \$500 sanction pursuant to Rule 11 of the North Carolina Rules of Civil Procedure. Thus, Small argues that the trial court sought to impose its sanction pursuant to a rule of *civil* procedure while he was representing his client in a *criminal* matter, and so contends the trial court lacked jurisdiction to impose the sanction at issue.

In support of his claim, Small draws this Court’s attention to the following statement made by the trial court at the end of the hearing on defendant’s motions: “Cou[r]t finds that there’s no legal [sic] for the filing of this motion, therefore, *pursuant to Rule 11 of the North Carolina Rules of Civil Procedure and the authority of—the inherent authority of the Court*, the Court will weigh and consider appropriate—an appropriate sanction.” (Emphasis added.) In other words, Small suggests that the trial court’s mention of Rule 11 during the rendition of its order to impose sanctions requires a finding by this Court that the trial court did not act pursuant to its inherent authority. Small also suggests that the language used in the court’s order which imposed the sanction “track[s] the statute’s language closely enough

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to infer that the court believed it was acting under the authority of Rule 11.”

However, Small does not dispute that, during the rendition of its order in open court, the trial court *did* state that it was sanctioning him pursuant to its inherent authority. In addition, in the order entered on 18 December 2008, the court concluded: “*This court has the inherent authority to sanction an attorney who signs and files a pleading without any factual or legal basis whatever and that is vexatious, as in this case. Accordingly, the defendant’s attorney, should be sanctioned as hereinafter ordered.*” (Emphasis added.) Since Small does not challenge any of the court’s findings of fact that served as the bases for its decision to sanction him and concedes the trial court had the authority to sanction him pursuant to its inherent authority, and since the order entered by the court plainly states that it sanctioned Small pursuant to such authority, we conclude this argument is without merit and overrule this assignment of error.

[2] Small next contends he was deprived of his due process rights when the trial court imposed its \$500 sanction because he was not provided with “adequate advance notice that sanctions might be imposed.” Although Small concedes he failed to raise his objection to this issue before the trial court and has not properly preserved the issue for appeal, *see* N.C.R. App. P. 10(a)(1) (amended Oct. 1, 2009), we nevertheless exercise our discretion to consider this issue. *See* N.C.R. App. P. 2.

“Notice and an opportunity to be heard prior to depriving a person of his property are essential elements of due process of law which is guaranteed by the Fourteenth Amendment of the United States Constitution.” *Griffin v. Griffin*, 348 N.C. 278, 280, 500 S.E.2d 437, 438 (1998) (internal quotation marks omitted). Accordingly, prior to the imposition of sanctions, “a party has a due process right to notice both (1) of the fact that sanctions may be imposed, and (2) the alleged grounds for the imposition of sanctions.” *Zaliagiris v. Zaliagiris*, 164 N.C. App. 602, 609, 596 S.E.2d 285, 290 (2004) (citing *Griffin*, 348 N.C. at 280, 500 S.E.2d at 438-39), *disc. review denied*, 359 N.C. 643, 617 S.E.2d 662, *appeal withdrawn*, 360 N.C. 180, 625 S.E.2d 114 (2005).

Small directs this Court’s attention to *Griffin v. Griffin*, 348 N.C. 278, 500 S.E.2d 437 (1998), as instructive in this case. However, we conclude that Small’s reliance on *Griffin* is misplaced. In *Griffin*,

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during the course of a custody action, an attorney for a non-party filed an adoption petition without providing notice to any of the parties to the action. *See Griffin*, 348 N.C. at 278-79, 500 S.E.2d at 438. Because one of the parties contended “the adoption proceeding was filed to harass [the parties] and disrupt the orders of the court in th[e] custody case,” that party filed a Rule 11 motion seeking sanctions against the attorney who filed the petition. *See id.* at 279, 500 S.E.2d at 438. Nevertheless, after hearing the Rule 11 motion, the trial court decided to impose sanctions on the attorney, but did not do so based on the allegations in the Rule 11 motion before it. *See id.* Instead, on its own motion, the court “impose[d] sanctions for the filing of pleadings for which [the attorney] had not received notice that such sanctions would be sought.” *See id.* at 280, 500 S.E.2d at 438. Thus, although the attorney “was notified that sanctions were proposed for filing the adoption proceeding, . . . sanctions were [actually] imposed for something else.” *Id.* at 280, 500 S.E.2d at 439. Since the Supreme Court concluded that, “[i]n order to pass constitutional muster, the person against whom sanctions are to be imposed must be advised in advance of the charges against him,” the *Griffin* Court remanded to vacate the order imposing sanctions on the attorney. *See id.*

However, in the present case, unlike *Griffin*, the record before us indicates that Small had prior notice of the grounds upon which the trial court was asked to consider sanctions against him, and that those grounds served as the bases for the sanctions imposed. In its Response to defendant’s Motion to Recuse, which was properly served upon Small, the State alleged:

9. That defense counsel has requested that the Defendant receive a plea arrangement whereby the defendant will receive “time served” and the State has denied that request;
10. That defense counsel has disagreed with the State on the merits of the case, as well as the strengths and weaknesses of the case, and does not believe the State can prove its case and has therefore filed this frivolous Motion;
11. That defense counsel is merely being vindictive by filing this frivolous Motion since this Assistant District Attorney will not agree to the counteroffer and defense counsel is therefore acting unprofessionally, unethically and not in the best interest of his client;

....

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19. That defense counsel has become too personally involved in this case to the extent that all reasonableness and professionalism has been skewed . . . .

In its Response to defendant's Motion to Continue, which was also properly served upon Small, the State alleged:

6. *That on September 23, 2008 and not November 12, 2008*, as alleged in this Motion, the State notified the defendant of the January 19, 2009 trial date as referenced in the attached copy of State's letter dated September 23, 2008;

. . . .

10. That at no time did defense counsel, prior to filing this Motion contact this Assistant District Attorney and notify her of a "Mediation and Continuing Legal Education Training" that was scheduled for January 21-23, 2009 and that this trial takes precedent over any type CLE training;

. . . .

12. That pursuant to Rule 26(F)(1) and (2) of the General Rules of Practice for Superior and District Courts, for secured leave "to be effective, the designation *shall* be filed (1) no later than ninety (90) days before the beginning of the secure leave period; *and* (2) before any trial, hearing, deposition or other matter has been regularly scheduled, peremptorily set or noticed for a trial during the designated secure leave period";
13. That defense counsel has not complied with Rule 26(F)(1) and (2) of the General Rules for Practice for Superior and District Courts since the designation was not filed 90 days or more prior to the beginning of this scheduled trial, therefore defense counsel's secured leave for a CLE is not effective.

The State then specifically requested in its Responses to defendant's Motions to Continue and Recuse that the trial court impose sanctions against Small.

Small does not dispute that the State's Responses to defendant's Motions to Continue and Recuse requested that the court impose sanctions against Small, or that the State's Responses were properly served upon defendant Halley through Small. Small only argues that he did not have sufficient notice that sanctions "were to be addressed that day," and so could not "meaningfully contest the charges against

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him.” However, the purpose of the 18 December 2008 hearing was to address defendant Halley’s motions and the State’s responses to those motions. Since the grounds for the State’s request for sanctions arose from its allegations that the motions filed by Small had no merit and violated the General Rules of Practice for the Superior and District Courts and Rules of Professional Conduct, Small unquestionably was put on notice that he would need to address these issues at the hearing on defendant’s motions. Thus, we conclude that Small had notice that sanctions may be imposed for filing defendant’s Motions to Recuse and Continue, had notice of the grounds upon which those sanctions were imposed against him, and had an opportunity to address those grounds throughout the entire hearing on defendant’s motions. Therefore, this argument is also without merit.

Affirmed.

Judges McGEE and ERVIN concur.

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STATE OF NORTH CAROLINA v. THOMAS MARLAND VEAZEY

No. COA09-566

(Filed 8 December 2009)

**1. Evidence— motor vehicle checkpoint—motion to suppress—resolution of conflicting evidence**

The trial court’s findings of fact in its order denying defendant’s motion to suppress evidence obtained at a motor vehicle checkpoint were supported by competent evidence because it is for the trial court to resolve conflicts in the evidence and such resolution will not be disturbed on appeal.

**2. Constitutional Law— Motor vehicle checkpoint**

In evaluating the constitutionality of a motor vehicle checkpoint, a court considers the primary programmatic purpose of a checkpoint and, if the purpose is valid, the reasonableness of the checkpoint, as determined by weighing the factors set forth in *Brown v. Texas*, 433 U.S. 47.

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**3. Constitutional Law— Motor vehicle checkpoint—primary programmatic purpose**

The trial court's conclusions that the primary programmatic purpose of the checkpoint was the enforcement of the State's motor vehicle law, that this purpose was lawful, and that the checkpoint was tailored to fit this purpose were supported by the findings.

**4. Constitutional Law— Motor vehicle checkpoint—reasonableness**

The trial court's findings of fact and conclusions of law indicate that the trial court considered the factors set forth in *Brown* in concluding that the checkpoint was not unreasonable and therefore valid under the Fourth Amendment to the Constitution.

Appeal by defendant from order entered 13 March 2009 by Judge L. Todd Burke in Stokes County Superior Court. Heard in the Court of Appeals 27 October 2009.

*Attorney General Roy Cooper, by Assistant Attorney General Tamara Zmuda, for the State.*

*The Dummit Law Firm, by E. Clarke Dummit, for defendant.*

BRYANT, Judge.

On 1 January 2006, defendant Thomas Marland Veazey was charged with driving without a valid license and driving while impaired ("DWI") after being stopped at a driver's license checkpoint. Defendant was found guilty of DWI in district court and appealed to superior court. Prior to trial, defendant moved to suppress all evidence obtained at the checkpoint, alleging that his detention at the checkpoint was unconstitutional. Following a hearing, the trial court denied the motion and defendant subsequently pled no contest to DWI at the 5 June 2007 criminal session of Stokes County Superior Court, reserving his right to appeal the denial of his motion. Defendant appealed to this Court. We remanded, instructing the trial court to make additional findings of fact and conclusions of law regarding the constitutionality of the checkpoint. *See State v. Veazey*, 191 N.C. App. 181, 662 S.E.2d 683 (2008). We also held that, in the event the trial court found the initial checkpoint was constitutional, the "facts provided a sufficient basis for reasonable suspicion permitting . . . further investigation and detention of [d]efendant." *Id.* at 195, 662 S.E.2d at 692. On 13 March 2009, the trial court entered an

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order, with findings of fact and conclusions of law, denying defendant's motion to suppress. Defendant again appeals. As discussed below, we affirm.

*Facts*

On 1 January 2006, North Carolina State Trooper F.K. Carroll and another law enforcement officer set up a traffic checkpoint just outside the city limits of Walnut Cove in Stokes County. Trooper Carroll's purpose was to "to enforce any kind of motor vehicle law violations" he might encounter. Shortly thereafter, defendant approached the checkpoint and was stopped. Defendant produced a valid State of Washington driver's license, although his car had North Carolina license plates. Trooper Carroll also detected a strong odor of alcohol coming from the vehicle and noticed that defendant's eyes were red and glassy. Trooper Carroll directed defendant to pull onto the shoulder and, in doing so, defendant ran over an informational sign. When asked whether he had been drinking, defendant responded that he had consumed several beers. After defendant registered two positive readings on Alcosensor tests, Trooper Carroll arrested him.

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On appeal, defendant brings forward four assignments of error, contending the trial court erred in (I) making findings of fact not supported by competent evidence, (II) admitting evidence gained during a constitutionally unreasonable checkpoint, (III) admitting evidence gained at an unconstitutional checkpoint, and (IV) admitting evidence gained from a checkpoint that lacked a specific programmatic purpose. Finding no error in the trial court's order, we affirm.

*Standard of Review*

"This Court's review of a trial court's denial of a motion to suppress in a criminal proceeding is strictly limited to a determination of whether the court's findings are supported by competent evidence, even if the evidence is conflicting, and in turn, whether those findings support the court's conclusions of law." *In re Pittman*, 149 N.C. App. 756, 762, 561 S.E.2d 560, 565 (citation omitted), *disc. review denied*, 356 N.C. 163, 568 S.E.2d 608 (2002), *cert. denied*, 538 U.S. 982, 155 L. Ed. 2d 673 (2003). "[I]f so, the trial court's conclusions of law are binding on appeal." *State v. West*, 119 N.C. App. 562, 565, 459 S.E.2d 55, 57, *disc. review denied*, 341 N.C. 656, 462 S.E.2d 524 (1995). "If there is a conflict between the state's evidence and defendant's evidence on material facts, it is the duty of the trial court to resolve the conflict and such resolution will not be disturbed on appeal." *State v. Chamberlain*, 307 N.C. 130, 143, 297 S.E.2d 540, 548 (1982).

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## I

[1] Defendant first challenges findings of fact 12, 14, 15 and 17, asserting that they are not supported by competent evidence. We disagree.

The challenged findings state:

12. In selecting this portion of Highway 311 for a license check-point, Trooper Carroll was aware of numerous violations of North Carolina Motor Vehicle law from traffic in that area including No Operator's License, Driving While License Revoked, Inspection Violations, Expired Tags, and No Liability Insurance.

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14. Trooper Carroll had been successful in the past with license checkpoints at this location, finding many violations.

15. Trooper Carroll's focus in organizing this license checkpoint was motor vehicle violations and [he] testified repeatedly that the purpose of this license checkpoint was for the enforcement of motor vehicle law.

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17. Resolving all conflicts in the testimony, the primary programmatic purpose of the checkpoint was to determine if drivers were duly licensed and observing the motor vehicle laws of North Carolina.

We begin by noting that defendant fails to cite any authority, either statutes or case law, in this portion of his brief, and we could dismiss this argument on that ground. See N.C. R. App. P. 28(b)(6) (2007); *Sugar Creek Charter Sch., Inc. v. Charlotte-Mecklenburg Bd. of Ed.*, — N.C. App. —, — 673 S.E.2d 667, 676 (2009). However, even if we reach the merits of his argument, defendant cannot prevail. In his brief, defendant acknowledges that Trooper Carroll testified to the facts summarized in findings of fact 12, 14 and 15. He then argues that they “are not supported by competent evidence as Trooper Carroll made statements that *conflict* with the findings in that his statements encompass more than is represented by the findings of fact.” (Emphasis added). Likewise, he contends that finding of fact 17 is erroneous because “[t]he primary purpose of the checkpoint was not merely to determine if drivers were duly licensed and observing motor registration laws. It was also set up to check for DWIs.” Thus, defendant does not argue that these findings are not supported by

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competent evidence, but rather disagrees with the trial court's resolution of conflicts in the evidence. Where evidence is conflicting, it is for the trial court "to resolve the conflict and such resolution will not be disturbed on appeal." *Chamberlain*, 307 N.C. at 143, 297 S.E.2d at 548. Findings 12, 14, 15 and 17 are supported by competent evidence. This assignment of error is overruled and the trial court's findings of fact are binding.

*II, III and IV*

[2] Defendant's three remaining assignments of error and the corresponding arguments in his brief challenge the constitutionality of the checkpoint on various grounds. In evaluating the constitutionality of a checkpoint, a reviewing court must first determine the primary programmatic purpose of the checkpoint under *City of Indianapolis v. Edmond*, 531 U.S. 32, 148 L. Ed. 2d 333 (2000), and if the purpose is valid, must consider whether the checkpoint was reasonable under the balancing test articulated in *Brown v. Texas*, 443 U.S. 47, 61 L. Ed. 2d 357 (1979). *Veazey*, 191 N.C. App. at 185-86, 662 S.E.2d at 686-87.

In his brief, defendant essentially reargues his case for suppression of the evidence, an argument more properly addressed to the trial court. Neither his assignments of error nor the arguments in his brief specifically refer to or challenge any of the trial court's conclusions of law; he also fails to argue that the conclusions are not supported by the findings of fact. Parts of defendant's argument challenge a finding from the original order denying his motion to suppress, even though that order is not appealed from here. These arguments are clearly inapposite.

Defendant argues that the checkpoint did not meet the balancing test required under *Brown*. However, defendant acknowledges that the superior court here applied the *Brown* balancing test, but once again contends that it erred in "tak[ing] Trooper Carroll on his word with respect to some statements and not considering his other statements." There is no error in the trial court's so doing. Weighing the credibility of witnesses and resolving conflicts in their testimony is precisely the role of the superior court in ruling on a motion to suppress. *Chamberlain*, 307 N.C. at 143, 297 S.E.2d at 548. Defendant would have this Court reapply the *Brown* balancing test, but this is not our task. Having determined above that competent evidence supports the trial court's findings of fact, our further review is limited to determining whether those findings support the trial court's conclusions of law. *In re Pittman*, 149 N.C. App. at 762, 561 S.E.2d at 565.

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Defendant does not argue that any *Brown*-related conclusions are not supported by the trial court's findings of fact.

Defendant also attacks the checkpoint here as permitting Trooper Carroll excessive discretion. He asks that we overrule "a string of poor decisions involving checkpoints for drivers' licenses" from this Court as well the North Carolina Supreme Court, relief we could not grant even were we so inclined. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Even in making this misplaced argument, defendant concedes that the United States Supreme Court case on which he bases his argument has approved stopping every vehicle as one acceptable way of limiting officer discretion. *See Delaware v. Prouse*, 440 U.S. 648, 663, 59 L. Ed. 2d 660, 674 (1979). Here, Trooper Carroll stopped every vehicle that approached the checkpoint.

Defendant having failed to argue that any particular conclusion of law is not supported by the findings, we could dismiss this portion of his appeal. However, even if we attempted to construct a proper appeal for defendant, each of the trial court's conclusions of law is fully supported by the findings of fact.

The trial court's order denying defendant's motion to suppress contains the following conclusions of law:

1. That Trooper Carroll complied with the statutory requirements for conducting a license checkpoint.
2. That the primary programmatic purpose of the checkpoint was the enforcement of the State's Motor Vehicle laws.
3. That the primary programmatic purpose of the license checkpoint was achieved systematically by stopping every vehicle and asking every driver for license and registration.
4. That the State has a "vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, that these vehicles are fit for safe operation, and hence that licensing, registration, and vehicle inspection requirements are being observed." 440 U.S. at 658. *City of Indianapolis v. Edmond*, 531 U.S. 32, 39 (2000) (quoting *Delaware v. Prouse*, 440 U.S. 648 (1979)).
5. That checkpoint stops are minimally intrusive, and are not subjective stops, like those arising from roving patrols, [and] checkpoints are viewed with less scrutiny than are roving patrols. *State v. Mitchell*, 358 N.C. 63, 66 (2004).

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6. That the primary programmatic purpose of this license checkpoint was lawful.
7. That the license checkpoint was tailored to fit the primary programmatic purpose by having obtaining [sic] prior approval from a supervisor and by having selected a stretch of roadway where violations [of] motor vehicle law had been observed by the arresting officer and where arrests for Driving While Impaired had been made in the past.
8. That the license checkpoint did not place unreasonable interference with individual liberty or privacy by: notifying oncoming motorists of an approaching checkpoint; obtaining prior approval from a supervising officer; stopping every vehicle coming through the license checkpoint; making visible the signs of the officers' authority.
9. That the stop and detention of the Defendant at the license checkpoint was not unreasonable and therefore valid under the Fourth Amendment of the United States Constitution.
10. That based on the totality of the circumstances Trooper Carroll lawfully obtained sufficient evidence to form a reasonable suspicion that the Defendant was committing the criminal offense of Driving While Impaired.
11. The parties have stipulated that this Order can be signed out of Term and out of Session.

Although not mentioned in his assignments of error, defendant argues in his brief that the checkpoint violated requirements of N.C. Gen. Stat. § 20-16.3A(a)(1) (2005) (since amended) because it lacked a "systematic plan" for stopping vehicles. However, finding of fact 3 states that the "checkpoint was organized pursuant to a pre-determined plan[.]" and finding 10 states that "[t]he license check was conducted systematically, every vehicle was stopped, and every driver was asked to produce driver's license and proof of registration." These findings fully support conclusion 1, "[t]hat Trooper Carroll complied with the statutory requirements for conducting a license checkpoint."

**[3]** Conclusions of law 2, 6 and 7 concern the checkpoint's programmatic purpose, which is the focus of defendant's fourth argument and assignment of error. Defendant once again argues that Trooper Carroll gave conflicting testimony about his purpose in setting up

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the checkpoint and urges this Court to overrule the trial court's resolution of same. This is not our role. *See Chamberlain*, 307 N.C. at 143, 297 S.E.2d at 548. Defendant fails to argue that these conclusions of law are unsupported by the trial court's findings of fact. Defendant acknowledges that a checkpoint with a primary programmatic purpose of enforcing motor vehicle laws is permissible. In addition, findings 12, 14, 15 and 17, quoted *supra*, fully support the trial court's conclusions that "the primary programmatic purpose of the checkpoint was the enforcement of the State's Motor Vehicle laws" and that this purpose was lawful and the checkpoint was tailored to fit this purpose.

Nothing in defendant's brief refers to or challenges conclusions of law 3, 4, 5, 10 or 11. We note that denominated conclusion 4 is simply a quotation from one of the primary cases upon which defendant relies and conclusion 5 is a statement of our State's case law on checkpoint stops. Conclusion 10 holds that Trooper Carroll lawfully obtained sufficient evidence to create reasonable suspicion that defendant was driving while impaired. Conclusion 11 is a stipulation by the parties.

[4] Conclusions 8 and 9 concern the reasonableness of the checkpoint, a determination made under *Brown* by weighing "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Brown*, 443 U.S. at 51, 61 L. Ed. 2d at 362. The court's findings and other conclusions indicate that the trial court considered these factors, concluding that the State has a strong interest in enforcing motor vehicle laws (findings 2, 12, 14, 15, 16 and 17, and conclusion 4), that the checkpoint was tailored to meet this purpose (findings 4, 7, 10-12, and 14-17, and conclusion 7) and that the checkpoint constituted a minimal intrusion on drivers' liberty (conclusion 5). Thus, conclusions 8 and 9 are fully supported. These assignments of error are overruled.

AFFIRMED.

Judges WYNN and McGEE concur.

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[201 N.C. App. 406 (2009)]

JAMES KEVIN PIKE, PLAINTIFF v. D.A. FIORE CONSTRUCTION SERVICES, INC.,  
A NORTH CAROLINA CORPORATION, DEFENDANT

No. COA09-520

(Filed 8 December 2009)

**Negligence— duty of care—general contractor to subcontractor’s employee**

The trial court did not err in a negligence case arising out of a construction accident by granting summary judgment in favor of defendant general contractor and dismissing the action with prejudice because plaintiff subcontractor employee did not establish that defendant failed to exercise proper care in the performance of a duty owed to plaintiff.

Appeal by plaintiff from order entered 4 February 2009 by Judge Mark Powell in Buncombe County Superior Court. Heard in the Court of Appeals 12 October 2009.

*The Moore Law Office, by George W. Moore, for plaintiff-appellant.*

*Northup, McConnell & Sizemore, PLLC, by Robert E. Allen, for defendant-appellee.*

*Cranfill, Sumner & Hartzog, L.L.P., by Jaye Bingham, for workers’ compensation employer and carrier.*

MARTIN, Chief Judge.

Plaintiff James Kevin Pike<sup>1</sup> appeals from the trial court’s order granting summary judgment in favor of defendant D.A. Fiore Construction Services, Inc. (“defendant-general contractor”) and dismissing the action with prejudice. For the reasons stated, we must affirm.

The parties do not dispute that, in March 2006, plaintiff was employed as a carpenter by B.G. Construction. At that time, B.G. Construction was employed by defendant as a framing subcontractor on a residential construction project for which defendant was the general contractor.

Plaintiff worked as the “cut man” on B.G. Construction’s three-member crew and, on 16 March 2006, was responsible for cutting

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1. Plaintiff died after filing his Notice of Appeal. The administrator of his estate, Tracie S. Hart, has been substituted as a party plaintiff. However, this opinion still refers to the decedent as “plaintiff.”

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sheets of plywood for the other crew members to use to “sheet[] the roof.” The parties agree that, on that day, plaintiff undertook to relocate his cutting operation from the ground to a second-floor landing located in the interior of the residential structure in order to facilitate his ability to pass plywood panels to the other members of his crew while they worked on the roof of the structure. In order to help plaintiff relocate his cutting operation, the other two members of plaintiff’s crew began to pass sheets of 4-foot-by-8-foot plywood from the ground to plaintiff, who was located on the second-floor landing. Plaintiff alleges that he was in the process of stacking one of the thirty-pound sheets of plywood when he stepped backwards and fell from the landing onto the concrete floor approximately ten feet below. Plaintiff further alleges that, “[a]s a result of his fall, [plaintiff] struck the back of his head on the concrete floor and the plywood board that he had been holding when he fell struck his forehead.” Consequently, plaintiff sustained “a depressed skull fracture and a complex laceration of his scalp, which . . . resulted in traumatic brain injury.” The parties do not dispute that, at the time that plaintiff fell, the second-floor landing was not equipped with a guardrail and, unlike the other two members of his crew, plaintiff was not wearing a safety harness. However, while defendant-general contractor asserts that, “[p]rior to the fall, a railing had been installed, which the plaintiff removed,” plaintiff asserts that “[n]o person removed the railing from the platform because no railing was ever placed on the platform.”

Plaintiff filed a workers’ compensation claim against his employer, B.G. Construction, for which he was awarded compensation benefits pursuant to an Opinion and Award by the North Carolina Industrial Commission. On 19 June 2007, plaintiff filed his Complaint in the present action in Buncombe County Superior Court against defendant-general contractor, alleging that plaintiff’s injuries “were proximately caused by [defendant-general contractor’s] negligence.” In defendant-general contractor’s Amended Answer to Plaintiff’s Complaint, it denied plaintiff’s allegations and set forth four affirmative defenses, including its contention that “plaintiff’s injuries were proximately caused by his own contributory negligence.”

On 8 October 2008, defendant-general contractor moved for summary judgment on the grounds that “a general contractor owes no duty to the employee of a subcontractor under the circumstances of this case, and on the grounds that the undisputed facts of this case establish that the [p]laintiff was contributorily negligent as a matter

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of law.” The trial court heard the motion on 6 January 2009. On 4 February 2009, the court entered its order granting defendant-general contractor’s motion for summary judgment and dismissing the action with prejudice. Plaintiff gave timely notice of appeal to this Court on 10 February 2009.

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“In a negligence action, to survive a motion for summary judgment, plaintiff must establish a *prima facie* case by showing”: “(1) that defendant failed to exercise proper care in the performance of a duty owed plaintiff; (2) the negligent breach of that duty was a proximate cause of plaintiff’s injury; and (3) a person of ordinary prudence should have foreseen that plaintiff’s injury was probable under the circumstances.” *Bolick v. Bon Worth, Inc.*, 150 N.C. App. 428, 430, 562 S.E.2d 602, 603 (quoting *Lavelle v. Schultz*, 120 N.C. App. 857, 859-60, 463 S.E.2d 567, 569 (1995), *disc. review denied*, 342 N.C. 656, 467 S.E.2d 715 (1996)), *disc. review denied*, 356 N.C. 297, 570 S.E.2d 498 (2002). Thus, although “negligence actions are rarely susceptible to summary judgment[,] . . . if it is shown the defendant had no duty of care to the plaintiff, summary judgment is appropriate.” *Croker v. Yadkin, Inc.*, 130 N.C. App. 64, 66-67, 502 S.E.2d 404, 406 (citation omitted), *disc. review denied*, 349 N.C. 355, 525 S.E.2d 449 (1998).

“The Courts of North Carolina have long recognized that a general contractor is not liable for injuries sustained by a subcontractor’s employees.” *Hooper v. Pizzagalli Constr. Co.*, 112 N.C. App. 400, 403, 436 S.E.2d 145, 148 (1993) (citing *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991)), *disc. review denied*, 335 N.C. 770, 442 S.E.2d 516 (1994). Moreover, “North Carolina law provides that a general contractor does not have a duty to furnish a subcontractor or the subcontractor’s employees with a safe place in which to work.” *Id.* at 403-04, 436 S.E.2d at 148 (citing *Brown v. Texas Co.*, 237 N.C. 738, 76 S.E.2d 45 (1953)). “Instead, it is the duty of the subcontractor to provide himself and his employees with a safe place to work and, also, to provide proper safeguards against the dangers of the work.” *Id.* at 404, 436 S.E.2d at 148. “However, North Carolina does recognize a few exceptions to the general rule of no liability.” *Id.* “These exceptions are: (1) situations where the contractor retains control over the manner and method of the subcontractor’s substantive work, (2) situations where the work is deemed to be inherently dangerous, and (3) situations involving negligent hiring and/or retention of the subcontractor by the general contractor.” *Id.*

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“It is also well-settled that the employee of a subcontractor working for a general contractor is an invitee [or lawful visitor] in relation to the general contractor.” *Langley v. R.J. Reynolds Tobacco Co.*, 92 N.C. App. 327, 329, 374 S.E.2d 443, 445 (1988) (citing *Wellmon v. Hickory Constr. Co.*, 88 N.C. App. 76, 362 S.E.2d 591 (1987), *disc. review denied*, 322 N.C. 115, 367 S.E.2d 921 (1988); *Cowan v. Laughridge Constr. Co.*, 57 N.C. App. 321, 291 S.E.2d 287 (1982)), *disc. review denied*, 324 N.C. 433, 379 S.E.2d 241 (1989). “Ordinarily, therefore, both the general contractor and the owner of the premises owe to the subcontractor and its employees the duty of ordinary care.” *Id.* However, “[t]his rule extends only to defects which the subcontractor or his employees could not have reasonably discovered and of which the owner or general contractor knew or should have known.” *Id.*

In the present case, plaintiff does not allege that defendant-general contractor’s liability arises from one of the recognized exceptions to the prevailing rule that a general contractor is not liable for injuries sustained by a subcontractor’s employee. Plaintiff also does not allege that defendant-general contractor breached a “duty of ordinary care” owed to plaintiff as a lawful visitor. Instead, plaintiff alleges only that, “as the prime or general contractor of the construction project where the [p]laintiff [was a lawful visitor, defendant-general contractor] . . . owed a duty to the [p]laintiff to comply with [all applicable] safety requirements and regulations,” and that defendant-general contractor was negligent because it failed to comply with several federal Occupational Safety and Health Administration (“OSHA”) regulations. Plaintiff then directs this Court’s attention to excerpts from *Cowan v. Laughridge Construction Co.*, 57 N.C. App. 321, 291 S.E.2d 287 (1982), to support his contention that North Carolina courts have “recognized liability of a general contractor for injuries to employees of subcontractors on construction sites” based on a general contractor’s failure to comply with OSHA regulations, even though this Court concluded in *Cowan* that a violation of federal OSHA regulations “does not constitute negligence *per se*.” *See Cowan*, 57 N.C. App. at 325, 291 S.E.2d at 290; *see also* N.C. Gen. Stat. § 95-131(a) (2007) (adopting federal OSHA regulations as the rules of the North Carolina Commissioner of Labor). After careful review, we conclude that plaintiff has misapplied *Cowan* to the present case.

In *Cowan*, a roofing subcontractor’s employee was injured after falling off of a ramp that was furnished by the general contractor. *See Cowan*, 57 N.C. App. at 322, 291 S.E.2d at 288. The ramp, which was

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used by “[a]ll employees” and was “the only access [the subcontractor’s] employees had to reach the roof,” was alleged to have been furnished by the defendant. *See id.* at 322-23, 291 S.E.2d at 288. This Court recognized that the plaintiff was “an invitee to whom defendant owed a duty of ordinary care,” and so stated that, “[w]hen defendant furnished a ramp which was the only access to the building’s roof, it could reasonably foresee that plaintiff would use the ramp. [Accordingly, this Court determined that d]efendant owed plaintiff the duty to use proper care in the ramp’s construction.” *Id.* at 324, 291 S.E.2d at 289 (emphasis added) (citing *Casey v. Byrd*, 259 N.C. 721, 723, 131 S.E.2d 375, 377 (1963) (stating that, where a contractor “furnishes appliances to be used for a particular purpose with knowledge of such use, he is liable for a defect therein created by his own negligence, or negligently permitted to exist, where such negligence renders the appliance dangerous to life and limb of those who may use the same” (internal quotation marks omitted))). Consequently, after considering all of the evidence, including evidence that the general contractor had violated certain OSHA regulations by furnishing a ramp without guardrails and toeboards for use by all lawful visitors, this Court held that all of the evidence was “sufficient to permit a finding that defendant failed to exercise ordinary care in the construction of the ramp and that the results of its failure were foreseeable.” *See id.* at 325, 291 S.E.2d at 290.

However, unlike *Cowan*, the evidence in the present case does not show that the landing from which plaintiff fell was constructed or furnished by defendant-general contractor for the purpose of giving plaintiff access to the roof. The landing was a balcony located in the interior of the residential structure, built by one of plaintiff’s employer’s subcontractors for the purpose of overlooking the interior living area. Further, although plaintiff alleges that he was “required to perform his job duties” on the landing from which he fell, plaintiff provides no evidence to support this allegation. Plaintiff and one of his co-workers testified that the members of their crew chose to relocate to the second-floor landing on their own, even though plaintiff’s employer testified that he was prepared to provide steel scaffolding, ladders, metal walk boards, and harnesses if such equipment was required for the performance of the work. In other words, unlike *Cowan*, plaintiff in the present case neither alleged nor presented evidence that defendant-general contractor breached any duty owed to plaintiff as a lawful visitor on the premises. Thus, *Cowan* does not support plaintiff’s assertion that defendant-general contractor’s alleged failure to comply with OSHA regulations establishes

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that defendant-general contractor “failed to exercise proper care in the performance of a duty owed plaintiff” as a lawful visitor. *See Bolick*, 150 N.C. App. at 430, 562 S.E.2d at 603 (internal quotation marks omitted).

Plaintiff also asserts that *Sloan v. Miller Building Corp.*, 119 N.C. App. 162, 458 S.E.2d 30, *disc. review denied*, 341 N.C. 652, 462 S.E.2d 517 (1995), supports his contention that defendant-general contractor breached a duty owed to plaintiff in the present case. In *Sloan*, this Court held that the trial court improperly granted summary judgment in favor of the general contractor where a subcontractor’s employee was injured after falling from the third floor at a site where the general contractor had been cited for a serious OSHA violation involving the general contractor’s “failure to have standard railings or the equivalent on the open-sided second and third floors.” *See Sloan*, 119 N.C. App. at 164-65, 458 S.E.2d at 31. However, “[t]he sole issue presented by the parties [on appeal in *Sloan* wa]s whether the trial court erred by finding evidence of defendant’s willful or wanton negligence insufficient to overcome the bar of contributory negligence . . . .” *Id.* at 163, 458 S.E.2d at 30. Since the issue of whether the general contractor had breached any duty owed to a subcontractor’s employee was not before this Court in *Sloan*, we conclude that *Sloan* is not instructive on the issue of whether plaintiff established that defendant-general contractor “failed to exercise proper care in the performance of a duty owed plaintiff.” *See Bolick*, 150 N.C. App. at 430, 562 S.E.2d at 603 (internal quotation marks omitted).

We further conclude that plaintiff’s reliance on *North Carolina Commissioner of Labor v. Weekley Homes, L.P.*, 169 N.C. App. 17, 609 S.E.2d 407, *appeal dismissed and disc. review denied*, 359 N.C. 629, 616 S.E.2d 227 (2005), is misplaced. In *Weekley Homes*, a safety compliance officer with the North Carolina Department of Labor issued a citation to the general contractor after observing one of its subcontractor’s employees working without fall protection on a steep pitch roof over six feet from the ground in violation of OSHA regulations. *See Weekley Homes*, 169 N.C. App. at 18-19, 609 S.E.2d at 410. The matter on appeal before this Court in *Weekley Homes* was whether an administrative agency could issue a citation holding a general contractor “liable for violations that its subcontractor may create if [the general contractor] could reasonably have been expected to detect the violation by inspecting the job site.” *See id.* at 28, 609 S.E.2d at 415. However, since, contrary to plaintiff’s suggestion, *Weekley Homes* has not been recognized to stand for the propo-

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sition that a general contractor's violation of OSHA regulations necessarily gives rise to tort liability, we further conclude that *Weekley Homes* is not instructive in the present case.

Because plaintiff has not established that defendant-general contractor failed to exercise proper care in the performance of a duty owed to plaintiff which could serve as the basis for defendant-general contractor's liability to plaintiff, *see Bolick*, 150 N.C. App. at 430, 562 S.E.2d at 603, we hold the trial court did not err when it allowed defendant-general contractor's motion for summary judgment and dismissed the action with prejudice. Our disposition renders it unnecessary to address plaintiff's remaining argument.

Affirmed.

Judges JACKSON and ERVIN concur.

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STATE OF NORTH CAROLINA v. JERRY LENELL BELK

No. COA09-187

(Filed 8 December 2009)

**1. Evidence— lay opinion testimony**

Because the testifying police officer was in no better position than the jury to identify defendant as the person depicted in the surveillance video, the trial court erred by admitting the officer's lay opinion testimony.

**2. Evidence— lay opinion testimony**

There was no rational basis for the trial court to conclude that the police officer was more likely than the jury correctly to identify defendant as the individual depicted in the surveillance video where the officer's familiarity with defendant's appearance was based solely on three brief encounters with defendant and there was no evidence that defendant had altered his appearance prior to trial, that the individual depicted in the surveillance video had disguised his appearance at the time of the offense, that the individual's face or other features were obscured in the video or blocked by any item of clothing, or that the surveillance video viewed by the jury was unclear or blurred.

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**3. Evidence— prejudicial error**

As the jury was likely to give significant weight to the officer's testimony and the State's case rested exclusively on the surveillance video and the officer's identification of defendant in the video, the trial court committed prejudicial error by allowing into evidence the officer's identification testimony.

Appeal by defendant from judgment entered 10 September 2008 by Judge Robert C. Ervin in Superior Court, Mecklenburg County. Heard in the Court of Appeals 1 September 2009.

*Attorney General Roy Cooper, by Assistant Attorney General, Judith Tillman, for the State.*

*Jarvis John Edgerton, IV for defendant-appellant.*

WYNN, Judge.

Defendant Jerry Lenell Belk appeals his convictions for felony breaking and entering, felony larceny after breaking and entering, and obtaining habitual felon status. He argues that the trial court erred by allowing a police officer to testify that Defendant was the individual depicted in a surveillance video tape. After careful review, we hold that the trial court committed prejudicial error by admitting the testimony of Officer Ring, identifying the Defendant as the person depicted in the video surveillance tape, and remand for a new trial.

At trial, the State presented evidence tending to show the following: On 7 October 2007, Officer Aaron Appleman, a police officer with the Charlotte-Mecklenburg Police Department, responded to an alarm call at 500 West Fifth Street in Charlotte, N.C. at approximately 2:42 p.m. At the scene, the lobby door was open but intact. However, the glass door to the interior office suite occupied by Elder Design Limited (doing business as ESD Architecture<sup>1</sup>) "had been smashed into pieces." The rear office door and side window to the back office were also damaged. Elliott Elder, the chief executive officer of ESD Architecture, later reported that a laptop computer worth approximately \$2800 had been stolen.

On the day of the break-in, ESD Architecture was equipped with a video security system provided to the company by "a licensed bank

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1. In their briefs, both parties refer to the business as "E.D.S. Architecture." At trial, however, Mr. Elder, the CEO, called the business "ESD Architecture," and explained that ESD is a doing-business-as name. Both the arrest warrant and the indictments call the business "ESD Architecture."

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security system vendor.” The security company downloaded the video surveillance footage from 7 October 2007 onto a compact disk, which Danielle Matuszczk<sup>2</sup>, an operations manager at ESD Architecture, gave to Charlotte-Mecklenburg Police Officer Christopher Eubanks on 23 October 2007. During the course of the investigation, Charlotte-Mecklenburg Police Officer Donna Ring viewed the video surveillance footage and identified Defendant as the individual in the video.

Defendant was indicted for felony breaking and entering and felony larceny after breaking and entering on 10 December 2007, and for attaining habitual felon status on 11 August 2008. After a trial in Superior Court, Mecklenburg County, a jury issued guilty verdicts on all three counts. The trial court entered judgment and commitment on 10 September 2008, sentencing Defendant to a term of 133 to 169 months imprisonment with fifty-three days credit for confinement prior to judgment, and recommended a civil lien against Defendant for attorney’s fees (\$2460).

On appeal, Defendant argues that the trial court erred by allowing Officer Ring’s lay opinion testimony identifying Defendant as the person depicted in the video surveillance footage.

**[1]** Because Officer Ring was in no better position than the jury to identify Defendant as the person in the surveillance video, we hold that the trial court erred by admitting the officer’s testimony. Further, finding the error to be prejudicial, we remand for a new trial.

Pursuant to the N.C. Rules of Evidence, admissible lay opinion testimony “is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.” N.C. Gen. Stat. § 8C-1, Rule 701 (2007). Although N.C. appellate courts have not addressed the specific issue of lay opinion testimony identifying a defendant as the person depicted in a surveillance video, “[o]rdinarily, opinion evidence of a non-expert witness is inadmissible because it tends to invade the province of the jury.” *State v. Fulton*, 299 N.C. 491, 494, 263 S.E.2d 608, 610 (1980).

In *State v. Fulton*, our Supreme Court found an officer’s testimony that the design of the shoe tracks in a photograph of the crime

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2. This witness’s name is spelled inconsistently in the transcript. It appears as both Matuszczk and Matuszczk. The parties in their briefs use the latter, though it would appear from the transcript that the former may be correct, since it was apparently spelled out by the witness herself.

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scene was the same pattern as the tread on the defendant's shoe to be inadmissible lay opinion testimony. The Court reasoned "the jury was apparently as well qualified as the witness to draw the inferences and conclusions from the facts that [the officer] expressed in his opinion." *Id.* (citations omitted); *see also State v. White*, 154 N.C. App. 598, 605, 572 S.E.2d 825, 831 (2002) (holding inadmissible an officer's testimony that a recovered television was "more than probably" the victim's where testimony was not based on his perception); *State v. Shaw*, 106 N.C. App. 433, 417 S.E.2d 262 (holding opinion testimony not based on personal knowledge and not helpful to the jury was inadmissible because the jury was as qualified as the officer to infer from the facts that the defendant had broken into the victim's home), *disc. review denied*, 333 N.C. 170, 424 S.E.2d 914 (1992).

Because Rule 701 of the Federal Rules Evidence is identical to Rule 701 of the North Carolina Rules of Evidence, the federal jurisdictions' treatment of this issue is persuasive. *See* Fed. R. Evid. 701 (2007). As this Court noted in *State v. Buie*:

The current national trend is to allow lay opinion testimony identifying the person, usually a criminal defendant, in a photograph or videotape where such testimony is based on the perceptions and knowledge of the witness, the testimony would be helpful to the jury in the jury's fact-finding function rather than invasive of that function, and the helpfulness outweighs the possible prejudice to the defendant from admission of the testimony.

— N.C. App. —, —, 671 S.E.2d 351, 354-55 (internal quotation marks and citation omitted) (holding the trial court erred in admitting detective's testimony interpreting surveillance videotapes, where the tapes were played for the jury), *disc. review denied*, 363 N.C. 375, 679 S.E.2d 135 (2009). Specifically, courts adopting the majority trend have found the following factors to be relevant to this analysis:

(1) the witness's general level of familiarity with the defendant's appearance; (2) the witness's familiarity with the defendant's appearance at the time the surveillance photograph was taken or when the defendant was dressed in a manner similar to the individual depicted in the photograph; (3) whether the defendant had disguised his appearance at the time of the offense; and (4) whether the defendant had altered his appearance prior to trial.

*United States v. Dixon*, 413 F.3d 540, 545 (6th Cir. 2005) (citing *United States v. Pierce*, 136 F.3d 770, 774-75 (11th Cir. 1998)); *see, e.g., United States v. Henderson*, 68 F.3d 323 (9th Cir. 1995) (uphold-

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ing the admission of testimony where witness had known defendant for fifteen years and seen him frequently throughout that period); *United States v. Jackson*, 688 F.2d 1121 (7th Cir. 1982) (upholding the admission of testimony where witness had met the defendant only once, concluding the amount of time witness spent with the defendant goes to the weight rather than the admissibility of the evidence), *cert. denied*, 460 U.S. 1043, 75 L. Ed. 2d 797 (1983); *United States v. Borrelli*, 621 F.2d 1092 (10th Cir. 1980) (defendant's stepfather was in a better position than the jury to compare defendant's in-court appearance with that of the individual in the surveillance photograph where defendant had altered his appearance by changing his hairstyle and growing a mustache), *cert. denied*, 449 U.S. 956, 66 L. Ed. 2d 222 (1980); *United States v. Saniti*, 604 F.2d 603, 604-05 (9th Cir. 1979) (upholding the admission of testimony of defendant's roommates who identified the specific clothing worn by the individual in the surveillance photograph as belonging to the defendant).

These courts have also considered the clarity of the surveillance image and completeness with which the subject is depicted in their analysis. As the Sixth Circuit explained:

Lay opinion identification testimony is more likely to be admissible . . . where the surveillance photograph is of poor or grainy quality, or where it shows only a partial view of the subject. *See, e.g., United States v. Jackman*, 48 F.3d 1, 4-5 (1st Cir.1995) (upholding the admission of lay opinion identification testimony primarily because “[a]ll the surveillance photographs of the . . . robber are somewhat blurred, and they show only part of the robber’s face, primarily the left side from eye-level down”); *United States v. Allen*, 787 F.2d 933, 936 (4th Cir.1986) (upholding the admission of lay opinion identification testimony where one surveillance photograph showed one individual “with his jacket hood pulled over his head so that his hair, forehead and right eye are not visible,” and two other photographs were “incomplete reproductions of the man in the bank,” one showing “a profile of a man wearing a hardhat, rubbing his forehead, with his mouth open,” and the other showing “little more than a blurred profile, with most of the left half of the individual’s face hidden”), *vacated on other grounds*, 479 U.S. 1077, 94 L. Ed. 2d 132 (1987).

*Dixon*, 413 F.3d at 545; *see also Nooner v. State*, 907 S.W.2d 677, 687 (Ark. 1995) (upholding the admission of testimony where surveillance images were “somewhat blurred and indistinct[,]” the witnesses

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had special familiarity with the defendant, associated him with the clothing seen in the footage, and defendant had altered his appearance at trial), *cert. denied*, 517 U.S. 1143, 134 L. Ed. 2d 558 (1996); *People v. Mixon*, 180 Cal. Rptr. 772, 779 (Cal App. 1982) (upholding the admission of officer's testimony who had seen the defendant in a "variety of contexts both indoors and outdoors" where the surveillance photograph was taken at a downward angle, in poor lighting, and the subject was partially obscured).

We review a trial court's ruling on the admissibility of lay opinion testimony for abuse of discretion. *See State v. Washington*, 141 N.C. App. 354, 362, 540 S.E.2d 388, 395 (2000), *disc. review denied*, 353 N.C. 396, 547 S.E.2d 427 (2001). Thus, in this case, we must uphold the admission of Officer Ring's lay opinion testimony if there was a rational basis for concluding that she was more likely than the jury correctly to identify Defendant as the individual in the surveillance footage. *See Robinson v. People*, 927 P.2d 381, 382 (Colo. 1996) (upholding testimony by a police officer that identified the individual depicted in the surveillance videotape as the defendant on review for abuse of discretion).

[2] Here, there was no evidence presented by either party tending to show that the individual depicted in the surveillance footage had disguised his appearance at the time of the offense or that Defendant had altered his appearance prior to trial. Further, there was no testimony indicating that the individual's face or other features were obscured in the footage or blocked by any item of clothing. Indeed, at the trial, Officer Ring recounted seeing Defendant on a few occasions, all of which involved minimal contact. Based on this limited contact with Defendant and his "very distinctive profile," Officer Ring concluded that the person depicted in the surveillance video was the Defendant.

Additionally, Officer Ring and Detective Caldwell testified to the clarity of the surveillance footage as viewed by the officers, stating that the resolution was clear or "great" when viewed on the desktop computer in the police station but "very fuzzy" when shown on the large projection screen to the jury. While viewing the footage on a laptop at trial, Officer Ring commented, "This shows more of what I was looking at. You can tell that the picture is a lot clearer than what y'all [the jury] saw on the display."

However, as the trial transcript reveals, the jurors had the opportunity to view the video footage on a personal computer. During

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Officer Ring's testimony and at the State's request, the trial court instructed the officer on a number of occasions to turn the laptop computer toward the jury "so the jurors can see it," and to "show the people on the other end that can't see."

Although in Officer Ring's brief contacts with Defendant she may have become familiar with Defendant's "distinctive" profile, we hold that there was no basis for the trial court to conclude that the officer was more likely than the jury correctly to identify Defendant as the individual in the surveillance footage. Here, there is no evidence that Defendant altered his appearance between the time of the incident and the trial, that the individual depicted in the footage was wearing a disguise, or that there were any issues regarding the clarity of the surveillance footage not ameliorated by allowing the jurors to view the footage on the laptop. The only factor supporting the trial court's conclusion is Officer Ring's familiarity with Defendant's appearance, based on three brief encounters, the most recent being when she passed by Defendant in her patrol car. Accordingly, we hold that the trial court erred by allowing Officer Ring to testify that, in her opinion, the individual depicted in the surveillance video was Defendant.

**[3]** Having found that the trial court committed error by allowing the testimony of Officer Ring, we turn now to the question of whether such error was prejudicial, warranting a new trial. Under N.C. Gen. Stat. § 15A-1443(a) (2007):

A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant.

Here, the record reflects that the State's case rested exclusively on the surveillance video and Officer Ring's identification testimony. The State offered no fingerprint evidence, DNA evidence, or other identification testimony. Further, because the witness was a police officer with eighteen years of experience, the jury likely gave significant weight to Officer Ring's testimony. Officer Ring's testimony identifying the individual depicted in the surveillance video as the Defendant played a significant if not vital role in the State's case, making it reasonably possible that, had her testimony been excluded, a different result would have been reached at trial. *See State v. Hernandez*, 184 N.C. App. 344, 646 S.E.2d 579 (2007) (holding exclusion of admis-

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sible character evidence regarding complaining witness was prejudicial where the State's case rested almost exclusively on complaining witness's testimony, there was little or no physical or medical evidence at issue, and credibility of complaining witness was of significant probative value). Accordingly, we reverse and remand for a new trial.

New Trial.

Judges CALABRIA and ELMORE concur.

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IN THE MATTER OF: APPEAL OF: AMUSEMENTS OF ROCHESTER, INC., ET AL. CONCERNING  
THE DISCOVERY ASSESSMENT FOR TAX YEARS 2002 THROUGH 2007 BY PENDER COUNTY

No. COA09-234

(Filed 8 December 2009)

**Taxation—ad valorem—amusement ride equipment—business presence—not taxed elsewhere**

Amusement ride equipment that was in North Carolina for six months of the year was subject to taxation in North Carolina where Amusements of Rochester, Inc. statutorily established its domicile in North Carolina and did not prove that the property was being taxed in another state.

Appeal by taxpayer from order entered 30 December 2008 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 15 September 2009.

*Parker Poe Adams & Bernstein LLP, by Charles C. Meeker and Katherine E. Ross, for Pender County.*

*Allen and Pinnix, P.A., by Alfred P. Carlton, Jr., and M. Jackson Nichols, for taxpayer.*

ELMORE, Judge.

Amusements of Rochester, Inc. (ARI), appeals from the Property Tax Commission's (Commission) final decision that ARI's amusement park equipment had tax situs in Pender County on 1 January 2007 and that Pender County lawfully discovered and assessed *ad valorem*

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taxes on the equipment for the tax years 2002 to 2007. We affirm the Commission's decision.

FACTS

This case involves four parties, but only one, ARI, owns the assessed property. Powers Great American Midways Company (PGAM) is an umbrella organization that encompasses Great American Midways Company, Amusement Properties, Inc., and ARI. ARI is the holding company for PGAM's equipment. Leslie and Debbie Powers are also affiliated entities of ARI.

ARI is a foreign corporation located in New York, and it was granted a certificate of Authority to Operate in North Carolina on 25 July 2006. ARI's registered principal place of business is in Pender County and ARI also pays property taxes on real property in Pender County. ARI owns the amusement rides and the trailers upon which the rides are fixed when not being used. Each year, the equipment is used in carnivals in Virginia, Maryland, Pennsylvania, and New York from approximately late April to late October. When the equipment is not being used, it is maintained and stored in Pender County for approximately six months each year. ARI also employs fifteen year-round employees to rebuild and maintain the equipment.

Pender County contracted with Turner Business Appraisers, Inc. (TBA), to assess personal property taxes on businesses located in Pender County. On 14 September 2006, Pender County contacted ARI to inform them of TBA's tax audit. TBA contacted the Ad Valorem Division of the North Carolina Department of Revenue and requested an official position regarding ARI's tax situs. The department informed TBA that it would be unable to give TBA an official position on ARI's tax situs.

TBA valued ARI's amusement ride property at \$24,857,354.00 for the tax years 2002 through 2007 and ARI agreed to TBA's total valuation. TBA received a commission from its tax assessment.

On 24 August 2007, ARI submitted its notice of appeal to the Commission regarding Pender County's Assessment. On 16 September 2008, the Commission affirmed Pender County's determination that ARI's tax situs was in Pender County and its tax assessment of ARI's amusement ride equipment for tax years 2002 to 2007. ARI filed its notice of appeal, exceptions to the Commission's final decision, and a motion to reconsider on 16 October 2008.

## IN RE APPEAL OF AMUSEMENTS OF ROCHESTER, INC.

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ARGUMENT

ARI submitted nine issues on appeal, but the outcome of this case turns on whether the tax situs of ARI's amusement ride equipment was North Carolina or New York. ARI argues that its amusement ride equipment did not have tax situs in Pender County on 1 January 2007 and that Pender County did not have the authority to discover and assess *ad valorem* taxes on ARI's property for the 2002 through 2007 tax years. We overrule ARI's arguments and affirm the Commission's decision that ARI's tax situs in 2007 was North Carolina.

North Carolina General Statute § 105-345.2 governs the appellate standard of review of the North Carolina Property Tax Commission's decisions. N.C. Gen. Stat. § 105-345.2(c) provides that "[i]n making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error." N.C. Gen. Stat. § 105-345.2(c) (2007). For appeals from administrative tribunals, "[q]uestions of law receive *de novo* review, whereas fact-intensive issues such as sufficiency of the evidence to support [an agency's] decision are reviewed under the whole-record test." *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 894 (2004) (quotation and citation omitted; alterations in original). The standard of review, however, "is a moot question since we reach the same conclusion under both a *de novo* and whole record test review." *In re SAS Inst., Inc.*, — N.C. App. —, —, —, S.E.2d —, — (2009).

N.C. Gen. Stat. § 105-274 provides that, unless there is a statutory exemption, "[a]ll property, real and personal, within the jurisdiction of the State shall be subject to taxation." N.C. Gen. Stat. § 105-274 (2007). N.C. Gen. Stat. § 105-304 explains how to determine the tax situs of tangible personal property and "applies only to all taxable tangible personal property that has a tax situs in this State." N.C. Gen. Stat. § 105-304(a) (2007). As a general rule, "tangible personal property is taxable at the residence of the owner," and "[t]he residence of a domestic or foreign taxpayer other than an individual person is the place at which its principal North Carolina place of business is located." N.C. Gen. Stat. § 105-304(c)(2) (2007). However, "tangible personal property situated at or commonly used in connection with a business premises hired, occupied, or used by the owner of the personal property (or by the owner's agent or employee) is taxable at the place at which the business premises is situated." N.C. Gen. Stat. § 105-304(f)(2) (2007). Unless otherwise provided, "the value, owner-

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ship, and place of taxation of personal property, both tangible and intangible, shall be determined annually as of January 1.” N.C. Gen. Stat. § 105-285(b) (2007).

The North Carolina Supreme Court concluded that “[s]itus is an absolute essential for tax exaction.” *Billings Transfer Corp. v. County of Davidson*, 276 N.C. 19, 32, 170 S.E.2d 873, 883 (1969) (citations omitted). In *Billings*, the Supreme Court set out other relevant principles for determining tax situs, including:

2. The state of domicile may tax the full value of a taxpayer’s tangible personal property for which no tax situs beyond the domicile has been established so that the property may not be said to have “acquired an actual situs elsewhere.”
3. The state of domicile may constitutionally subject its own corporations to nondiscriminatory property taxes even though they are engaged in interstate commerce. It is only multiple taxation of interstate operations that violates the Commerce Clause.

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8. With respect to tangible movable property, a mere *general* showing of its continuous use in other states is insufficient to exclude the taxing power of the state of domicile.

9. The burden is on the taxpayer who contends that some portion of his tangible personal property is not within the taxing jurisdiction of his domiciliary state to prove that the same property has acquired a tax situs in another jurisdiction.

*Id.* at 32-35, 170 S.E.2d at 883-84 (citations omitted).

By statute, a taxpayer’s registered principal place of business can statutorily constitute the taxpayer’s domicile. *See* N.C. Gen. Stat. § 105-304(c)(2) (2007) (“The residence of a . . . foreign taxpayer . . . is . . . its principal North Carolina place of business[.]”). ARI was granted a Certificate of Authority to operate in North Carolina and, on the certificate, ARI listed its Pender County address as its principal place of business. Therefore, ARI statutorily established its “domicile” in North Carolina and, pursuant to *Billings*, North Carolina may tax its amusement ride equipment so long as the same property was not being taxed in another state.

ARI, as the taxpayer, has the burden of proving that its tangible personal property acquired a tax situs in New York, not North

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Carolina, as of 1 January 2007. ARI was incorporated in New York, and, although, ARI argues that it maintains its principal office in New York, its North Carolina certificate of authority listed its Pender County address as the street address and county of the principal place of business. ARI also transported and used its amusement ride equipment in four other states. However, ARI's continuous interstate use of its equipment cannot exclude North Carolina from taxing ARI's amusement ride equipment, especially when ARI did not provide any evidence establishing that it paid *ad valorem* taxes on the equipment elsewhere.<sup>1</sup> Thus, pursuant to N.C. Gen. Stat. § 105-304(c)(2), ARI is a resident of Pender County and it failed to establish that its tangible personal property had tax situs elsewhere.

In *In re Plushbottom and Peabody*, this Court addressed whether an *ad valorem* tax could be levied upon a business whose tangible personal property was only located in North Carolina for several weeks at a time. 51 N.C. App. 285, 289, 276 S.E.2d 505, 508 (1981). A business situs is “[a] situs acquired for tax purposes by one who has carried on a business in the state more or less permanent in its nature.” *Id.* (quotations and citations omitted). Business situs, however, must be established before determining whether tangible personal property has tax situs. *See id.* at 288, 276 S.E.2d at 507 (“But, does the record contain facts to support a finding that Plushbottom has a ‘business situs’ in North Carolina so as to subject its property to taxation by Mecklenburg County? In cases involving ‘intangibles’ and ‘tangibles’ the North Carolina Supreme Court answered ‘yes’ to this question in 1936.”).

The business in *Plushbottom* was headquartered in a 15,000-square-foot building in New York and it regularly employed eighty people and operated a 50,000-square-foot warehouse in Mecklenburg County. *Id.* at 289, 276 S.E.2d at 508. This Court found that “[t]he entire inventory of Plushbottom [was] channeled through Mecklenburg County, and no portion of this inventory [was] ever shipped to or ever passe[d] through New York.” *Id.* Therefore, this Court found that the business in *Plushbottom* had established a business situs in North Carolina so that its tangible personal property could be subject to taxation in North Carolina. *Id.* at 292, 276 S.E.2d at 510.

ARI argues that it maintains an office in New York and files state and federal taxes in New York with its New York address. However,

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1. During oral arguments, ARI's counsel confirmed that it paid no *ad valorem* taxes on this property in any state.

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like the business in *Plushbottom*, ARI acquired business situs in North Carolina. ARI identified its principal office as its Pender County address, established maintenance and storage facilities in Pender County, and regularly hired employees to work there. Therefore, ARI has “more or less” established a permanent business in North Carolina and can be subjected to North Carolina’s *ad valorem* taxes.

ARI contends that, even if this Court finds that its equipment has acquired a North Carolina tax situs, the equipment should be exempt pursuant to N.C. Gen. Stat. § 105-304(f)(2) because its purported business premises are in New York. ARI’s contention is misplaced and the exception will not apply. The amusement ride equipment was maintained and stored at its Pender County address which is the same address ARI listed as its principal place of business and which we have determined to be ARI’s business situs.

ARI did not meet its burden of proof that its amusement ride equipment had acquired a tax situs in New York as of 1 January 2007. Even though ARI’s amusement ride equipment was only in North Carolina for six months of every year, it acquired business situs in North Carolina because of its permanent business presence. By establishing a business situs in North Carolina, ARI met the prerequisite for a determination of whether it acquired a North Carolina tax situs. Therefore, ARI’s amusement ride equipment can be subject to taxation in North Carolina because ARI did not prove that, at the time, the property was also being taxed in another state. Accordingly, we affirm the Commission’s final decision that Pender County lawfully discovered and assessed *ad valorem* taxes on the equipment for the tax years 2002 to 2007.

Affirmed.

Judges WYNN and CALABRIA concur.

**HEWETT v. WEISSER**

[201 N.C. App. 425 (2009)]

GERALD E. HEWETT, PLAINTIFF v. ROBERT WILLIAM WEISSER,  
BONNIE VANHOUTEN WEISSER, AND TONYA GAIL GOODE, DEFENDANTS

No. COA08-1563

(Filed 8 December 2009)

**1. Accord and Satisfaction— written settlement agreement**

The trial court erred in granting summary judgment in favor of defendants Robert and Bonnie Weisser on their counterclaim for property damage where plaintiff pled accord and satisfaction as a defense to the counterclaim because there was no evidence forecast of a written settlement agreement of all claims.

**2. Accord and Satisfaction— written settlement agreement**

Plaintiff's pleading of accord and satisfaction to defendants' counterclaim could not act as a bar to his personal injury claim without the "written terms of a properly executed settlement agreement . . . [that] specifically stated that the acceptance of said settlement constitutes full settlement of all claims and causes of action arising out of the said motor vehicle collision or accident." N.C. Gen. Stat. § 1-540.2.

Appeal by plaintiff from order entered 25 August 2008 by Judge Gary L. Locklear in Superior Court, Brunswick County. Heard in the Court of Appeals 9 June 2009.

*David and Associates, P.L.L.C., by David F. Turlington, for plaintiff-appellant.*

*Ennis, Newton & Baynard, P.A., by Stephen C. Baynard, for Robert and Bonnie Weisser.*

STROUD, Judge.

The trial court granted summary judgment in favor of defendants, Robert and Bonnie Weisser because plaintiff pled accord and satisfaction. Plaintiff appeals arguing, *inter alia*, that pursuant to N.C. Gen. Stat. § 1-540.2 the trial court could not properly grant summary judgment for defendants Robert and Bonnie Weisser. For the following reasons, we agree and reverse the trial court order granting summary judgment in favor of defendants Robert and Bonnie Weisser.

**HEWETT v. WEISSER**

[201 N.C. App. 425 (2009)]

**I. Background**

On 10 September 2007, plaintiff filed a complaint against defendants Robert Weisser and Bonnie Weisser (hereinafter “the Weissers”) and defendant Tonya Goode (“Goode”). Plaintiff alleged that in 2004, defendant Bonnie Weisser owned a vehicle which she allowed defendant Robert Weisser to drive. Goode was driving a vehicle in which plaintiff was a passenger. There was a collision between the two vehicles, which plaintiff alleged was caused by the negligence of either Goode, defendant Robert Weisser, or both. Plaintiff sought damages for personal injuries he received in the accident. On 26 September 2007, Goode filed an answer and motions to dismiss. Goode also filed a crossclaim. On 20 November 2007, the Weissers filed an answer, counterclaim, crossclaims, and a motion to dismiss plaintiff’s complaint. Both Weissers counterclaimed against plaintiff for damage to Bonnie Weisser’s vehicle, but did not bring any claim for personal injury.

On 4 January 2008, plaintiff filed a reply to the Weisser’s counterclaim and requested that the Weisser’s counterclaim be dismissed. On 17 June 2008, the parties consented to allowing plaintiff to amend his reply to the Weisser’s counterclaim. On or about 20 June 2008, plaintiff amended his reply to the Weisser’s counterclaim pleading accord and satisfaction and requesting that the Weisser’s counterclaim for property damage be dismissed. Plaintiff alleged that defendant Bonnie Weisser had accepted payment in full and satisfaction for the property damage to her car; thus, her claim for property damage against him was barred by the settlement.<sup>1</sup>

On 23 August 2008, the Weissers moved for, *inter alia*, summary judgment. On 25 August 2008, the trial court granted, *inter alia*, the Weisser’s motion for summary judgment. The trial court ordered summary judgment in favor of the Weissers because “[p]laintiff’s affirmative defense of Accord and Satisfaction as to the Defendants’ Weissers Counterclaim entitles the Defendants Weissers to judgment as a matter of law.” On 28 August 2008, plaintiff filed a motion to certify the trial court’s order as not interlocutory, and thus, immediately appealable. On 15 September 2008, the trial court ordered that “[t]he summary judgment ordered in favor of the Weissers on August 18,

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1. During her deposition, defendant Bonnie Weisser admitted she had accepted a check from State Farm in full settlement of her property damage claim. During plaintiff’s deposition he stated that his father actually owned the vehicle in which he was a passenger and that the State Farm vehicle policy belonged to his father. Thus, plaintiff had no vehicle or vehicle insurance policy involved in the accident with the Weissers.

**HEWETT v. WEISSER**

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2008, is hereby deemed a final order, not interlocutory, and is immediately appealable[.]” Also on 15 September 2008, Goode voluntarily dismissed her crossclaim against the Weissers without prejudice, and the Weissers voluntarily dismissed their crossclaim against Goode without prejudice. Plaintiff appeals the trial court’s granting of summary judgment in favor of the Weissers which resulted in the dismissal of his personal injury claims against them.

**II. Summary Judgment****A. Interlocutory**

We first note that although this appeal is interlocutory, as the trial court’s order did not dispose of all claims, we will review this appeal as the trial court certified the order for appeal and “review will avoid piece-meal litigation.” See *Wiggs v. Peedin*, — N.C. App. —, —, 669 S.E.2d 844, 847 (2008) (citation omitted).

[T]he trial court certified plaintiffs’ appeal as immediately appealable pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure. Even though this Court is not bound by the trial court’s certification, in our discretion we review this interlocutory appeal because there is no just reason for delay and our review will avoid piece-meal litigation.

*Id.* (citation omitted).

**B. Standard of Review**

Summary judgment, by definition, is always based on two underlying questions of law: (1) whether there is a genuine issue of material fact and (2) whether the moving party is entitled to judgment. On appeal, review of summary judgment is necessarily limited to whether the trial court’s conclusions as to these questions of law were correct ones.

As the applicable standard of review is *de novo*, an appellate court must carefully examine the entire record in reviewing a grant of summary judgment, in order to assess the correctness of the trial court’s determination of the two questions of law automatically raised by summary judgment[.]

*Woods v. Mangum*, — N.C. App. —, —, 682 S.E.2d 435, 441 (2009) (citations, quotation marks, and brackets omitted).

## HEWETT v. WEISSER

[201 N.C. App. 425 (2009)]

## II. Accord and Satisfaction

[1] Plaintiff contends that the trial court erred in granting summary judgment in favor of the Weissers. Plaintiff argues granting summary judgment due to accord and satisfaction was erroneous because “no release nor other writing exists to document accord and satisfaction[.]” We agree.

N.C. Gen. Stat. § 1-540.2 provides that

[i]n any claim, civil action, or potential civil action which arises out of a motor vehicle collision or accident, settlement of any property damage claim arising from such collision or accident, whether such settlement be made by an individual, a self-insurer, or by an insurance carrier under a policy of insurance, shall not constitute an admission of liability on the part of the person, self-insurer or insurance carrier making such settlement, which arises out of the same motor vehicle collision or accident. It shall be incompetent for any claimant or party plaintiff in the said civil action to offer into evidence, either by oral testimony or paper writing, the fact that a settlement of the property damage claim arising from such collision or accident has been made; provided further, that *settlement made of such property damage claim arising out of a motor vehicle collision or accident shall not in and of itself act as a bar, release, accord and satisfaction, or discharge of any claims other than the property damage claim, unless by the written terms of a properly executed settlement agreement it is specifically stated that the acceptance of said settlement constitutes full settlement of all claims and causes of action arising out of the said motor vehicle collision or accident.*

N.C. Gen. Stat. § 1-540.2 (2003) (emphasis added).

[2] In the case before us, there was no written settlement agreement. The only document which evidences a settlement was the check from State Farm to defendant Bonnie Weisser, which she admittedly cashed in full settlement of her property damage claim. There was no evidence forecast of any written settlement agreement which disposes of any personal injury claim or “all claims[.]” *Id.*

The Weissers contend that summary judgment was properly granted in their favor because

[t]he settled law in North Carolina is that when a plaintiff pleads settlement and release as a bar to a defendant’s counterclaim, the

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pleading constitutes a ratification of the settlement and bars both plaintiff's and defendant's actions. . . . The key analysis for the court is not defense raised by which the Plaintiff pleads the settlement, but that a settlement is pled in defense. The court has found that pleading settlement can be asserted by alleging accord and satisfaction[.]

However, the case law cited by the Weissers in support of their argument is clearly distinguishable in that in those cases a release was actually executed.<sup>2</sup> See *Bolton Corp. v. T. A. Loving Co.*, 317 N.C. 623, 625, 347 S.E.2d 369, 370 (1986) ("On 21 February 1984, without approval of the plaintiff, Aetna paid \$136,445.29 to the defendant and obtained from the defendant a 'Release in Full' executed by the defendant's Executive Vice-President."), *review denied*, 325 N.C. 545, 385 S.E.2d 496 (1989); *Keith v. Glenn*, 262 N.C. 284, 287, 136 S.E.2d 665, 668 (1964) ("[Plaintiff] deliberately elected to plead: 'That the receipt of the sum of \$1,250.00 and the execution of said release was in compromise and settlement of a disputed claim[.]'"); *Bradford v. Kelly*, 260 N.C. 382, 383, 132 S.E.2d 886, 887 (1963) ("[A] release executed by the defendant on September 22, 1961 in consideration of \$559.02 whereby defendant had discharged [plaintiff] and his personal representatives from any liability growing out of the accident on September 18, 1961."); *Cannon v. Parker*, 249 N.C. 279, 281, 106 S.E.2d 229, 231 (1958) ("By the terms of the release (Exhibit A), [defendant], Administrator, for and in consideration of \$900.00 to him paid by Robert R. Cothran and [plaintiff], fully released and discharged them from liability on account of the collision[.]"); *Houghton v. Harris*, 243 N.C. 92, 94, 89 S.E.2d 860, 862 (1955) ("On the same day plaintiff Harris executed two releases[.]"). Though defendants' cited cases raise various issues regarding the release, it is clear that in each case there was actually an executed release. See *Bolton Corp.* at 625, 347 S.E.2d at 370; *Keith* at 287, 136 S.E.2d at 668; *Bradford* at 383, 132 S.E.2d at 887; *Cannon* at 281, 106 S.E.2d at 231; *Houghton* at 94, 89 S.E.2d at 862.

The only case defendants direct our attention to which does not explicitly state that a release was executed is *Snyder v. Kenan Oil Co.*, 235 N.C. 119, 68 S.E.2d 805 (1952); however, even in *Snyder* it is

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2. We also note that all of the cases cited by the Weissers with the exception of *Bolton Corp. v. T. A. Loving Co.*, 317 N.C. 623, 347 S.E.2d 370 (1986), precede the enactment of N.C. Gen. Stat. § 1-540.2 in 1967, the controlling statute; furthermore, *Bolton Corp.* deals with a breach of contract dispute so N.C. Gen. Stat. § 1-540.2 would have no relevance in the context of the case. See 317 N.C. 623, 347 S.E.2d 370.

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clear that there was a written or oral settlement agreement which “adjusted and settled *all* matters which arose or might arise out of said collision, as between the oil company and [defendant], as would a judgment duly entered in an action between said parties.” *Id.* at 120, 68 S.E.2d at 806. In addition, *Snyder* was decided prior to the enactment of N.C. Gen. Stat. § 1-540.2. Accordingly, defendants have failed to direct our attention to any case which is analogous to the present case, in that there was no executed release or a settlement agreement regarding all claims.

N.C. Gen. Stat. § 1-540.2 requires that a settlement as to property damage cannot “act as a bar, release, accord and satisfaction, or discharge of any claims other than the property damage claim, unless *by the written terms of a properly executed settlement agreement* it is specifically stated that the acceptance of said settlement constitutes full settlement of all claims and causes of action arising out of the said motor vehicle collision or accident.” N.C. Gen. Stat. § 1-540.2 (emphasis added). Since enactment of N.C. Gen. Stat. § 1-540.2, only two cases have cited it. *See Garrett v. Smith*, 163 N.C. App. 760, 594 S.E.2d 232 (2004); *Leach v. Robertson*, 49 N.C. App. 455, 271 S.E.2d 405 (1980).

In *Garrett v. Smith*, “defendant’s insurance company [provided a letter] regarding the settlement of the property damage claim[.]” 163 N.C. App. at 763, 594 S.E.2d at 234. Regarding the admissibility of the letter, this Court determined,

[t]he letter in this case confirming that defendant’s insurance company would pay for property damage expressly stated that it was merely a settlement of a disputed claim and was not an admission of liability or fault. As such, *evidence that defendant’s insurance company had agreed to settle any claim for property damage arising out of this accident was inadmissible in the subsequent action for personal injury damages as proof that defendant was liable for the accident.*

*Id.* at 764, 594 S.E.2d at 234 (emphasis added). *See also Leach* at 457, 271 S.E.2d at 406 (concluding plaintiff was barred from bringing her personal injury action, but only after she pled “a release for all claims”). Here in his 20 June 2008, “Amendment to Reply[.]” (original in all caps), plaintiff pled “accord and satisfaction in that the Defendant, BONNIE VANHOUTEN WEISSER, has been paid for her entire property damage, including rental expenses.” Plaintiff makes no mention of an executed release or settlement agreement regarding

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[201 N.C. App. 431 (2009)]

all claims; furthermore, defendants did not present the trial court with any such agreement. Pursuant to the plain language of N.C. Gen. Stat. § 1-540.2, we conclude that without the “written terms of a properly executed settlement agreement . . . [that] specifically stated that the acceptance of said settlement constitutes full settlement of all claims and causes of action arising out of the said motor vehicle collision or accident[.]” N.C. Gen. Stat. § 1-540.2, plaintiff’s pleading of accord and satisfaction cannot act as a bar to his personal injury claim. Accordingly, we reverse the trial court’s order granting summary judgment for the Weissers.

**IV. Conclusion**

As we are reversing the trial court’s summary judgment order, we need not address plaintiff’s other contentions.

REVERSED.

Judges WYNN and BEASLEY concur.

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STATE OF NORTH CAROLINA v. ALFONZA LAMONT SHOCKLEY

No. COA09-241

(Filed 8 December 2009)

**1. Evidence— driving while intoxicated—consecutively administered tests**

Because two of four attempted Intoxilyzer tests met the “consecutively administered tests” requirement under N.C.G.S. § 20-139.1(b3) (2005), the trial court did not err in admitting into evidence the lower of the two valid readings.

**2. Evidence— driving while intoxicated—consecutively administered tests**

Two Intoxilyzer tests conducted within 11 minutes of each other were “consecutively administered tests” where defendant’s failure to properly blow into the machine resulted in an intervening invalid reading.

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**3. Evidence— plain error**

The admission of testimony regarding defendant's refusal to give a subsequent breath sample, though possibly erroneous on relevancy grounds, did not rise to the level of plain error.

Appeal by defendant from judgment entered 26 June 2008 by Judge Henry V. Barnette, Jr. in Superior Court, Wake County. Heard in the Court of Appeals 29 September 2009.

*Attorney General Roy Cooper, by Assistant Attorney General John W. Congleton, for the State.*

*S. Hannah Demeritt, for defendant-appellant.*

WYNN, Judge.

Under N.C. Gen. Stat. § 20-139.1(b3), readings employed from chemical analyses of breath to prove alcohol concentration must be from “consecutively administered tests.”<sup>1</sup> Here, Defendant Alfonza Lamont Shockley challenges the trial court's admission of the results of non-consecutive Intoxilyzer tests. Because results were obtained from two of four attempted breath samples collected within a reasonable time, we hold that the readings in this case met the “consecutively administered tests” requirement under N.C. Gen. Stat. § 20-139.1(b3).

In the early morning hours of 28 September 2006, an off duty Raleigh police officer came upon a vehicle stopped at a green light at the intersection of Atlantic Avenue and Forest Oaks Drive. After observing that the vehicle remained stationary for an entire light cycle, he called other Raleigh police officers to investigate. When uniformed officers arrived on the scene, they found Defendant asleep in his car. The vehicle's engine was running and the rear lights indicated that the brakes were being depressed. Before waking Defendant, officers reached inside the vehicle, put the vehicle's transmission into park, turned the engine off, and removed the keys from the ignition. Officers noticed a strong odor of alcohol inside the vehicle. Only by shaking him and speaking to him in a loud voice were officers able to rouse Defendant. Defendant's responses to officers' questions were incoherent and his speech was slurred.

Officers had Defendant exit the vehicle to perform field sobriety tests. As he was exiting the vehicle, Defendant had to use the door for

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1. N.C. Gen. Stat. § 20-139.1(b3) (2005).

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balance, and as he walked toward the rear of the vehicle he used the car to keep himself upright. Officers also detected an odor of alcohol about Defendant's person. Defendant was unable to produce his driver's license at the officers' request. Because Defendant was unsteady on his feet, did not give coherent answers, did not produce his driver's license, and smelled of alcohol, officers arrested Defendant for DWI without conducting field sobriety tests.

Thereafter, officers conducted Defendant to the Wake County Jail, where he was escorted to a room used for chemical analyses. The Intoxilyzer 5000 is used to determine alcohol concentration by taking samples of a suspect's breath. To register an adequate sample, a suspect must blow into the machine with sufficient force. After reading Defendant his rights regarding the chemical analysis, waiting the mandatory fifteen-minute observation period, and calibrating the machine, Officer Jonathan Gray requested that Defendant blow into the mouthpiece. At 6:05 a.m., Defendant provided a valid breath sample of 0.16. Officer Gray re-calibrated the machine, and asked Defendant to provide another sample. While blowing into the mouthpiece for a second time, Defendant turned his head slightly, allowing air to escape past the mouthpiece and preventing the machine from receiving an adequate sample. Defendant explained that he was unable to perform the second blow because an exposed nerve in his tooth made it too painful.

Officer Gray waited fifteen minutes before initiating another test. He then requested that Defendant blow again into the Intoxilyzer machine. At 6:23 a.m., Defendant provided a valid breath sample of 0.15.<sup>2</sup> Officer Gray then requested that Defendant provide another sample. Again, Defendant turned his head slightly, failing to make a proper seal with the mouthpiece. On the fourth blow, the Intoxilyzer again returned an invalid reading.

Officer Gray did not ask Defendant to blow again. The officer re-calibrated the machine and registered a "refusal," based on his opinion that during the second and fourth blows Defendant had willfully tried not to provide a sufficient sample. Officer Gray noted Defendant's refusal at 6:33 a.m.

On the day of the trial but before the jury was empaneled, the trial court was asked to consider the admissibility of the Intoxilyzer

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2. We note that these results are within the 0.02 window allowed by N.C. Gen. Stat. § 20-139.1(b3). Defendant does not challenge admissibility under this prong of the test.

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results. The admissibility of Intoxilyzer results was governed by the pre-December 1, 2006 version of North Carolina General Statute § 20-139.1(b3). In pertinent part, it reads:

(b3) Sequential Breath Tests Required.—By January 1, 1985, the regulations of the Commission for Health Services governing the administration of chemical analyses of the breath shall require the testing of at least duplicate sequential breath samples. Those regulations must provide:

...

(2) That the test results may only be used to prove a person's particular alcohol concentration if:

a. The pair of readings employed are from consecutively administered tests; and

b. The readings do not differ from each other by an alcohol concentration greater than 0.02.

(3) That when a pair of analyses meets the requirements of subdivision (2), only the lower of the two readings may be used by the State as proof of a person's alcohol concentration in any court or administrative proceeding.

A person's refusal to give the sequential breath samples necessary to constitute a valid chemical analysis is a refusal under G.S. 20-16.2(c).

A person's refusal to give the second or subsequent breath sample shall make the result of the first breath sample, or the result of the sample providing the lowest alcohol concentration if more than one breath sample is provided, admissible in any judicial or administrative hearing for any relevant purpose, including the establishment that a person had a particular alcohol concentration for conviction of an offense involving impaired driving.

N.C. Gen. Stat. § 20-139.1(b3)(2005).

The trial court reserved judgment on the issue, allowing defense counsel to object at the appropriate time. When the State attempted to introduce the Intoxilyzer results, defense counsel objected, and the trial court conducted a *voir dire* of Officer Gray on the admissibility of the results. The trial court subsequently overruled the objection, and the State was allowed to introduce evidence of the lower of the two valid breath samples collected. Officer Gray also testified,

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without objection, that Defendant had willfully refused to comply with the test. Defendant was convicted by a jury of DWI, and judgment was entered on 26 June 2008. This appeal followed.

Defendant argues that the trial court erred in admitting two forms of prohibited evidence: (I) results of non-consecutive Intoxilyzer tests, and (II) testimony regarding Defendant's refusal. For the reasons enunciated below, we disagree.

We review the trial court's admission of the Intoxilyzer results *de novo*. *State v. Hazelwood*, 187 N.C. App. 94, 98, 652 S.E.2d 63, 66 (2007), *cert. denied*, No. 09-5598, 2009 U.S. LEXIS 8077 (U.S. Nov. 9, 2009).

## I.

[1] Defendant first challenges the trial court's admission of the results of non-consecutive Intoxilyzer tests. This Court addressed similar facts in *State v. White*, 84 N.C. App. 111, 351 S.E.2d 828 (1987). In that case, defendant was asked to provide a breath sample by blowing into the breathalyzer machine. He did as requested, and the first breath sample of 0.20 was recorded at 11:15 a.m. *Id.* at 114, 351 S.E.2d at 830. Defendant was asked to provide a second sample, but on this attempt merely "puffed" into the machine, preventing the chemical analyst from obtaining a reading. The machine indicated that the breath sample had been insufficient and failed to give a result. *Id.* A third attempt resulted in another invalid reading. Warned by the attendant analyst that another failure would be considered a willful refusal, defendant provided a sufficient sample of 0.19 on his fourth attempt at 11:26 a.m. *Id.* at 114, 351 S.E.2d at 830.

On appeal, defendant in *White* argued that the intervening attempts made the results inadmissible because they were not "sequential breath samples," as required under the first paragraph of N.C. Gen. Stat. § 20-139.1(b3). The State argued that "under subparagraph (2)a, there were 'consecutively administered tests,' as the machine automatically rejects insufficient breath samples and, therefore, no 'tests' were conducted on those samples." *White*, 84 N.C. App. at 114, 351 S.E.2d at 830. This Court in *White* found that the results obtained met the statutory requirements for admission under N.C. Gen. Stat. § 20-139.1(b3).

Because these readings were taken from "consecutively administered tests" on adequate breath samples given within eleven minutes of one another, and because the readings are within .01 of

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one another, the statute requiring sequential testing was, in our view, complied with in this case. To hold otherwise would allow an accused to thwart the testing process by deliberately giving insufficient breath samples.

*White*, 84 N.C. App. at 114, 351 S.E.2d at 830.

[2] Defendant's attempts to distinguish *White* from the case *sub judice* are unconvincing. In both cases, the defendants consented to a test of their breath; the only adequate samples provided were tested consecutively; and two valid readings that did not differ from each other by an alcohol concentration greater than 0.02 were collected. To distinguish this case as we are asked to do based on the supposition that "[w]hen [officer] Gray chose to start the observation period over, it indicated his intention to start the testing over, effectively nullifying the results of the previous testing period," would create a distinction (between consecutive and non-consecutive tests) based on nothing more than a difference of six minutes. This we decline to do.

We do not fail to notice either that the defendant in *White* provided two intervening invalid samples, whereas Defendant here provided only one. Defendant does not offer any explanation for how fewer interruptions could make the tests any less consecutive than they were in *White*. Consequently, we now hold that the trial court did not commit reversible error when it allowed admission into evidence of the lesser of Defendant Shockley's sequential and consecutive Intoxilyzer results.

Defendant also argues that the trial court submitted a question of law to the jury when it "did not specifically find or conclude that the blows were sequential, but admitted the evidence over defense objection." Defendant is correct to assert that what constitutes evidence, or what is admissible, is a question of law for the court. *State v. Walters*, 275 N.C. 615, 623, 170 S.E.2d 484, 490 (1969). But it does not follow that a question of law, in this case, was submitted to the jury. The question of the admissibility of the evidence was decided by the judge in ruling on Defendant's objection. We therefore find no merit to this argument.

## II.

[3] Defendant also challenges the trial court's admission of Officer Gray's testimony regarding Defendant's willful refusal to comply with the testing procedure. A willful refusal to submit to an Intoxilyzer test is not a necessary element of DWI. N.C. Gen. Stat. § 20-138.1 (2005).

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Defendant's real objection to the testimony regarding his refusal can only be based on the possibility that the trial court ruled the Intoxilyzer results admissible pursuant to subsection (3) of N.C. Gen. Stat. § 20-139.1(b3), which allows admission of the first breath sample where there is a subsequent refusal. Standing alone, the testimony is at most irrelevant.<sup>3</sup> But the Intoxilyzer results were admissible under *White* based on consecutive testing, not based on Defendant's refusal. Thus Defendant's conviction rests squarely on admissible evidence. Because we hold that there was no error in admitting the lower of the Intoxilyzer results pursuant to N.C. Gen. Stat. § 20-139.1(b3) without regard to the refusal provisions, we need not reach the issue of whether the result was also admissible due to a subsequent refusal. The admission of the testimony regarding Defendant's refusal, though possibly erroneous on relevancy grounds, was not objected to at trial; and does not rise to the level of plain error. *See State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

No error.

Judges CALABRIA and ELMORE concur.

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LINDA VAN DYKE, AS ADMINISTRATRIX OF THE ESTATE OF PAUL VAN DYKE, PLAINTIFF V. CMI TEREX CORPORATION; HAUKE MANUFACTURING CO.; ASTEC, A SUBSIDIARY OF ASTEC INDUSTRIES, INC.; ASTEC INDUSTRIES, INC.; ASTEC, INC.; JOHN WILLIAM COPELAND, III, INDIVIDUALLY; JAMES T. SMITH, INDIVIDUALLY; ROBBIE ROBINSON, INDIVIDUALLY; THE LANE CONSTRUCTION CORPORATION; AND CITY OF KINGS MOUNTAIN, DEFENDANTS

No. COA09-539

(Filed 8 December 2009)

### 1. Appeal and Error— interlocutory order—substantial right

The Lane Construction Corporation's appeal from the denial of its summary judgment motion, based on grounds that it was entitled to the protection of the exclusivity provisions of the Workers' Compensation Act, was dismissed as from an interlocutory order where Lane failed to establish that its liability was inseparable

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3. Defendant implicitly recognizes this conclusion when he observes in his brief "as the judge had already heard evidence of purportedly consecutive Intoxilyzer results, evidence of a refusal was unnecessary. . . ."

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from that of Rea Contracting such that the trial court's denial of summary judgment created a risk of inconsistent verdicts and affected a substantial right.

**2. Civil Procedure— summary judgment—genuine issue of material fact**

Even if the trial court reached the merits of Lane's appeal, the trial court did not err in denying's Lane's motion for summary judgment as there is a genuine issue of material fact as to whether Lane's allegedly negligent actions were taken in its own interests or in the course of conducting Rea's business.

Appeal by defendant The Lane Construction Corporation from an order dated 7 January 2009 by Judge James W. Morgan in Cleveland County Superior Court. Heard in the Court of Appeals 27 October 2009.

*Cranfill Sumner & Hartzog, L.L.P., by Patrick H. Flanagan and Bradley P. Kline, for defendant-appellant Lane Construction Corporation.*

*White & Allen, P.A., by Matthew S. Sullivan, and Abrams & Abrams, P.A., by Douglas B. Abrams, Margaret S. Abrams and Noah B. Abrams, for plaintiff-appellee.*

BRYANT, Judge.

Plaintiff Linda Van Dyke, as Administratrix of the Estate of Paul Van Dyke, filed this action on 29 October 2007 alleging breach of warranty and negligence claims against various manufacturers of plant equipment, *Pleasant v. Johnson* claims against certain employees of Rea Contracting, L.L.C. ("Rea"), and negligence claims against the City of Kings Mountain and appellant The Lane Construction Corporation ("Lane"). On 25 November 2008, Lane moved for summary judgment, contending that the Workers' Compensation Act ("the Act") precludes plaintiff's claims against it as a matter of law. On 8 December 2008, the trial court heard Lane's motion and subsequently denied it by order dated 7 January 2009. Lane appeals. As discussed below, we dismiss this appeal as interlocutory.

*Facts*

Plaintiff's decedent, Paul Van Dyke, was an employee at an asphalt plant in Kings Mountain owned by Rea. On 10 November 2005, Van Dyke was struck and killed by a steel pipe during an explo-

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sion at the plant. Lane is the parent corporation of Lane Carolinas Corporation, L.L.C. (“Lane Carolinas”), which is, in turn, the sole member-manager of Rea.

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On appeal, Lane brings forward a single assignment of error: the trial court erred in denying its motion for summary judgment because “Lane Carolinas Corporation is a Limited Liability Company acting as the sole member-manager of Rea Contracting LLC, that Lane Carolinas Corporation is a wholly-owned subsidiary of The Lane Corporation, and as such, Defendant Lane Construction Corporation is entitled to the protection of the exclusivity provision of the North Carolina Worker’s [sic] Compensation Act.” We note that although the assignment of error states that Lane Carolinas is an L.L.C., the record indicates that Lane Carolinas is actually a corporation.

*Grounds for Appellate Review*

The denial of summary judgment is not a final judgment. *Cagle v. Teachy*, 111 N.C. App. 244, 247, 431 S.E.2d 801, 803 (1993). “An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.” *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381, *reh’g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). “Generally, there is no right of immediate appeal from interlocutory orders” unless a substantial right is affected. *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725-26, 392 S.E.2d 735, 736 (1990). “[T]he appellant bears the burden of showing to this Court that the appeal is proper.” *Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338, *affirmed*, 360 N.C. 53, 619 S.E.2d 502 (2005).

[1] Lane contends that the trial court’s denial of its motion for summary judgment affects a substantial right and cites *Hamby v. Profile Prods., L.L.C.*, 361 N.C. 630, 652 S.E.2d 231 (2007), in support of this contention. *Hamby* also concerned an interlocutory appeal from the denial of a motion for summary judgment. *Id.* at 633, 652 S.E.2d at 233. Profile, the member-manager of Terra-Mulch, the LLC employer in *Hamby*, argued there was a risk of inconsistent verdicts because the plaintiffs’ claims against Terra-Mulch would “proceed before the Industrial Commission while plaintiffs’ claims against Profile [would] proceed in civil court, even though the facts and issues before each tribunal would be the same.” *Id.* at 634, 652 S.E.2d at 234. The Supreme Court reversed this Court’s dismissal of the appeal as inter-

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[201 N.C. App. 437 (2009)]

locutory after finding that “Profile’s liability for actions taken while managing Terra-Mulch is inseparable from the liability of Terra-Mulch, and thus the trial court’s denial of summary judgment for Profile while granting summary judgment for Terra-Mulch creates a risk of inconsistent verdicts.” *Id.* at 639, 652 S.E.2d at 237. Thus, we consider whether Lane’s liability is inseparable from Rea’s such that a risk of inconsistent judgments arises from the trial court’s denial of summary judgment.

The Workers’ Compensation Act provides the exclusive remedy for an employee asserting personal injury or death by accident claims against his employer and “those conducting his business.” N.C. Gen. Stat. § 97-9 (2007). In *Hamby*, the Supreme Court held that the member-manager was entitled to the protections of the Act’s exclusivity provisions because, “[a]s one conducting the employer’s business and able to bind the employer, the liability of a member-manager is the same as that of the LLC employer it manages.” 361 N.C. at 639, 652 S.E.2d at 236-37. In contrast, we have held that where the employer and its parent corporation or sole shareholder are merely separate but related entities, the exclusivity provision does not apply. *Cameron v. Merisel, Inc.*, 163 N.C. App. 224, 233, 593 S.E.2d 416, 423 (2004), *disc. review improvidently allowed*, 359 N.C. 317, 608 S.E.2d 755 (2005); *Phillips v. Stowe Mills, Inc.*, 5 N.C. App. 150, 154, 167 S.E.2d 817, 820 (1969).

Rea is an LLC formed under the laws of Delaware. “The North Carolina LLC Act states that the liability of a foreign LLC’s managers and members is governed by the laws of the state under which the LLC was formed.” *Hamby*, 361 N.C. at 636, 652 S.E.2d at 235 (citing N.C.G.S. § 57C-7-01 (2005)). Under Delaware law, a member-manager’s liability is inseparable from the LLC’s *when the member-manager is conducting the LLC’s business*. *Id.* at 638, 652 S.E.2d at 236. For its actions in conducting Rea’s business, Lane Carolinas would be protected by the exclusivity provisions; however, it is Lane, not Lane Carolinas, which is the party moving for summary judgment here.

Lane Carolinas is a corporation formed under the laws of Delaware, while Lane is a corporation formed under the laws of Connecticut and also is the sole shareholder of Lane Carolinas. N.C. Gen. Stat. § 55-15-05(b) (2007) provides that foreign corporations authorized to transact business in North Carolina are subject to the same liabilities as domestic corporations. “[A] shareholder of a corporation is not personally liable for the acts or debts of the corpora-

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tion except that he may become personally liable by reason of his own acts or conduct.” N.C. Gen. Stat. § 55-6-22(b) (2007). Lane, as sole shareholder in Lane Carolinas, is thus shielded from liability for the acts of Lane Carolinas, but not from liability for Lane’s own negligent acts or conduct.

Lane’s assignment of error and the arguments in its brief focus on the nature of the relationship between itself and the employer, Rea. However, in *Hamby*, it was the nature of the claims asserted by plaintiff *in conjunction with* the relationship of Profile and Terra-Mulch which determined the Court’s holding. Unlike in *Hamby*, neither Rea nor Lane Carolinas is a party to this action, and plaintiff has alleged no claims against either entity. In her complaint, plaintiff contends Lane breached its legal duty to her decedent in failing to “provide proper warnings, operating procedures, and instructions on the subject machinery,” and in failing to “exercise reasonable care and diligence in the selection, safety procedures, safety equipment, and operating procedures for use” at the asphalt plant. In its motion for summary judgment, Lane asserts that the Act’s exclusivity provisions apply to it because Lane was, through its wholly-owned subsidiary Lane Carolinas, the sole member-manager of Rea. Lane further submitted the affidavit of Donald P. Dobbs, Executive Vice President of Lane, Secretary of Lane Carolinas, and Assistant Secretary of Rea, stating that Lane owns 100% of the stock of Lane Carolinas and “oversees and has complete control over Lane Carolinas,” and that Lane and Lane Carolinas share the same principal officers and board of directors. However, in plaintiff’s memorandum opposing Lane’s motion for summary judgment, she asserts that her complaint states claims against Lane “that are independent from the actions of the subsidiary-employer, REA.”

This is unlike *Hamby*, in which the “plaintiffs allege[d] that Profile ‘control[led] and direct[ed]’ the business affairs of Terra-Mulch and d[id] not distinguish their allegations against, nor the actions of, Terra-Mulch and Profile, claiming both were grossly negligent and caused Hamby’s workplace injury.” 361 N.C. at 638, 652 S.E.2d at 236. Here, in contrast, plaintiff does not allege that Lane controlled and directed the actions of Rea or Lane Carolinas, nor does she make the same claims against Rea or Lane Carolinas as against Lane. Plaintiff instead alleges that Lane acted negligently out of its own interests, not in its management or conduct of Rea’s business. Neither Lane’s motion nor the Dobbs affidavit directly addresses the nature of plaintiff’s negligence claim against Lane, instead

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focusing solely on the relationship between Lane, Lane Carolinas, and Rea. Further, on the record before us, we cannot determine whether Lane's liability is inseparable from that of Rea, and thus, we cannot hold that the trial court's denial of summary judgment creates a risk of inconsistent verdicts. Therefore, we dismiss this interlocutory appeal because Lane has failed to carry its burden of establishing grounds for appellate review. *Johnson*, 168 N.C. App. at 518, 608 S.E.2d at 338.

[2] Additionally, we note that the analysis for resolving this matter on the merits would be virtually identical to that required to determine whether Lane made its case that dismissal of this appeal would adversely affect a substantial right. Thus, were we to address the merits of Lane's appeal, we would affirm the trial court.

It is well-established that

[s]ummary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. The trial court may not resolve issues of fact and must deny the motion if there is a genuine issue as to any material fact. Moreover, all inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion. The standard of review for summary judgment is de novo.

*Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007) (internal citations and quotations omitted). Under North Carolina jurisprudence, summary judgment is rarely appropriate in a negligence case. *Moore v. Crumpton*, 306 N.C. 618, 624, 295 S.E.2d 436, 440 (1982). As discussed previously, taken in the light most favorable to plaintiff, there is a genuine issue of material fact as to whether Lane's allegedly negligent actions were taken in its own interests or in the course of conducting Rea's business. Thus, were we to reach the merits, we would find that the trial court did not err in denying Lane's motion for summary judgment.

DISMISSED.

Judges WYNN and McGEE concur.

## IN RE D.K.L.

[201 N.C. App. 443 (2009)]

IN THE MATTER OF: D.K.L.

No. COA09-357

(Filed 8 December 2009)

**Appeal and Error— failure to give proper notice of appeal—  
notice in open court prior to entry of final written order**

The Court of Appeals lacked jurisdiction to review a juvenile delinquency case because the juvenile's notice of appeal given in open court prior to the entry of the juvenile court's final written order was improper under N.C.G.S. § 7B-2602.

Appeal by juvenile from order filed 26 November 2008 by Judge Peter Mack in Pamlico County District Court. Heard in the Court of Appeals 30 September 2009.

*Lucas & Ellis, PLLC, by Anna S. Lucas, for juvenile-appellant.*

*Attorney General Roy Cooper, by Assistant Attorney General Jane L. Oliver, for the State.*

STEELMAN, Judge.

Because juvenile did not properly give notice of appeal pursuant to N.C. Gen. Stat. § 7B-2602, this Court lacks jurisdiction to review this appeal. Juvenile's appeal is dismissed.

**I. Factual and Procedural Background**

On 2 July 2008, the State filed four separate petitions alleging that D.K.L. (juvenile) was a delinquent juvenile in that he had committed: two counts of misdemeanor wrongfully breaking or entering a building in violation of N.C. Gen. Stat. § 14-54(b); two counts of felonious breaking or entering a building with the intent to commit a felony or larceny in violation of N.C. Gen. Stat. § 14-54(a); and two counts of felonious larceny pursuant to felonious breaking and entering in violation of N.C. Gen. Stat. § 14-72(b)(2). On 10 September 2008, the juvenile court found that juvenile had committed all the alleged offenses and adjudicated juvenile delinquent.

At the 15 October 2008 dispositional hearing, the juvenile court did not enter a final order but only specified the conditions for juvenile's release from detention, including that he abide by his parents' rules, that he remain enrolled in school, and that he abide by a cur-

## IN RE D.K.L.

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few from 8:00 p.m. to 6:00 a.m. The juvenile court did not address the issues of placement in a wilderness program, restitution, or probation. At the beginning of the hearing, juvenile's counsel informed the court that while he conceded the recommendations for disposition were reasonable, he objected to disposition, and juvenile intended to appeal from the adjudication of delinquency. At the conclusion of the dispositional hearing, juvenile gave notice of appeal in open court. Appellate entries were filed that same day.

On 26 November 2008, the juvenile court filed its disposition order, entering a Level 2 disposition requiring the juvenile to cooperate with placement in a wilderness program, to pay restitution, and placing him on probation.

Juvenile appeals.

## II. Notice of Appeal

"It is well established that '[f]ailure to give timely notice of appeal . . . is jurisdictional, and an untimely attempt to appeal must be dismissed.'" *In re A.L.*, 166 N.C. App. 276, 277, 601 S.E.2d 538, 538 (2004) (quoting *In re Lynette H.*, 323 N.C. 598, 602, 374 S.E.2d 272, 274 (1988)).

N.C. Gen. Stat. § 7B-2602 authorizes the appeal of any final order in a juvenile matter. The statute provides that notice of appeal must be entered either "in open court at the time of the hearing or in writing within 10 days after entry of the order." N.C. Gen. Stat. § 7B-2602 (2007). Final orders shall include:

- (1) Any order finding absence of jurisdiction;
- (2) Any order which in effect determines the action and prevents a judgment from which appeal might be taken;
- (3) Any order of disposition after an adjudication that a juvenile is delinquent or undisciplined; or
- (4) Any order modifying custodial rights.

*Id.* An adjudication of delinquency is not a final order. *In re J.L.W.*, 136 N.C. App. 596, 602, 525 S.E.2d 500, 504 (2000) (quoting *In re Taylor*, 57 N.C. App. 213, 214, 290 S.E.2d 797, 797 (1982)).<sup>1</sup> Thus, we

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1. At the time *In re J.L.W.* and *In re Taylor* were decided, the statute in effect was N.C. Gen. Stat. § 7B-666, which was repealed by 1998 N.C. Sess. Laws 202, § 5. The current statute, N.C. Gen. Stat. § 7B-2602, was added by 1998 N.C. Sess. Laws 202, § 6. The session laws took effect on 1 July 1999, and the wording of the two statutes are virtually identical.

## IN RE D.K.L.

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examine juvenile's notice of appeal in open court at the conclusion of the disposition hearing on 15 October 2008.

While N.C. Gen. Stat. § 7B-2602 permits oral notice of appeal at the hearing, the statute only provides for appellate review upon any "final order." Thus, it "appears that oral notice of appeal given at the time of the hearing must be from a final order." *In re Hawkins*, 120 N.C. App. 585, 587, 463 S.E.2d 268, 270 (1995)<sup>2</sup>. In *Hawkins*, respondent-mother gave notice of appeal in open court at the conclusion of a hearing on a petition alleging abuse, neglect, and dependency of a minor child. *Id.* at 586-87, 463 S.E.2d at 269-70. At the time of the hearing, the trial court found "that there is evidence that the child is abused and neglected," but made no reference to the dependency allegation. *Id.* at 587, 463 S.E.2d at 270. This Court held that, because the trial court had not ruled on all matters raised in the petition, the trial court had not rendered a final order at the time of the hearing, thus respondent-mother's oral notice of appeal was premature. *Id.*

In the instant case, the juvenile court had not rendered a final order at the time of the dispositional hearing because it had not ruled on all recommendations for disposition and did not address all matters included in the written order. At the hearing, the juvenile court only issued an order setting the conditions for juvenile's release from detention. Juvenile's counsel asked, "Judge, just so I can clarify, the payment of restitution, the placing him on probation, the referral to Eckerd Camp, obviously, those could not be imposed as conditions." The court responded, "Not at this point." The juvenile court's written order, filed on 26 November 2008, ordered juvenile to be placed in a wilderness program, to pay restitution, and to be placed on probation. Juvenile filed no notice of appeal after the juvenile court's final written order.

Accordingly, we conclude that juvenile's notice of appeal, given in open court prior to the entry of the juvenile court's final written order, was not a timely notice of appeal. Because we hold that the juvenile failed to give proper notice of appeal, we dismiss this appeal and do not review juvenile's arguments.

DISMISSED.

Judges McGEE and JACKSON concur.

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2. At the time *In re Hawkins* was decided, N.C. Gen. Stat. § 7B-666 was still in effect.

## CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 8 DECEMBER 2009)

ADCOX v. CLARKSON BROTHERS CONST. No. 09-401	Ind. Comm. (IC963100)	Affirmed
BARBOUR v. DINKEL No. 09-140	Cumberland (08CVS942)	Affirmed
BLYTH v. McCRARY No. 09-163	Haywood (04CVS370)	Dismissed
BROCK AND SCOTT HOLDINGS v. BONDURANT No. 09-552	Iredell (08CVD1025)	Affirmed
IN RE A.K. No. 09-892	Wilson (06JA120) (06JA121) (06JA118) (08JA35)	Affirmed
IN RE B.H. No. 09-982	Harnett (08J145)	Affirmed in part; re- versed and remanded in part
IN RE B.N.M. AND T.M. No. 09-846	Gaston (08JA37) (08JA36)	Affirmed
IN RE C.P., A.P., T.P., AND B.P. No. 09-1017	Caldwell (08J59-62)	Affirmed
IN RE D.S.A. No. 09-905	Yadkin (06J48)	Affirmed
IN RE M.K.M., C.R.M., AND S.S.M. No. 09-838	Caldwell (01J17) (02J1) (00J27)	Affirmed
IN RE S.L.G. AND D.K.G. No. 09-709	Iredell (05JT212) (05JT211)	Affirmed
IN RE J.C.C. AND J.N.K. No. 09-924	Henderson (07JT72) (03JT47)	Affirmed
IN RE K.C. No. 09-854	Cleveland (07JT176)	Affirmed
IN RE M.L.B. No. 09-897	Surry (08JA127)	Vacated and Remanded

IN RE N.T. No. 09-796	Mecklenburg (06J1028)	Affirmed
IN RE T.I., M.I., J.H., J.H., K.H. No. 09-1072	Durham (07J3-7)	Affirmed
IN RE Z.D.H. No. 09-832	Guilford (08JT311)	Affirmed
IN RE Z.D.H. No. 09-436	Iredell (06JB36)	Dismissed
LOCKLEAR v. PALM HARBOR HOMES, INC. No. 08-1562	Ind. Comm. (IC665675) (IC395486)	Affirmed
RIVAS v. N.C. DOT No. 09-122	Wake (07CVS18949)	Reversed and Remanded
STATE v. ALLEN No. 09-260	Forsyth (07CRS30156) (07CRS56652)	Affirmed
STATE v. AVERY No. 09-206	Johnston (06CRS54307) (06CRS54308) (06CRS54305)	No error at trial. Re- mand for resentencing
STATE v. BISHOP No. 09-419	Sampson (06CRS51636) (06CRS51634) (06CRS51643)	No Error
STATE v. CHAUDHARY No. 08-1399	Forsyth (07CRS61388)	Affirmed
STATE v. CLAIBORNE No. 09-576	Person (08CRS441)	No Error
STATE v. CONN No. 09-290	Henderson (06CRS20062)	No Error
STATE v. DAVIS No. 09-297	Edgecombe (07CRS54106)	No prejudicial error
STATE v. GAUSE No. 09-521	Brunswick (07CRS50726) (07CRS896)	No Error
STATE v. GRAHAM No. 09-416	Guilford (07CRS24654)	No Error
STATE v. KERLIN No. 09-75	Brunswick (06CRS55357) (07CRS6015) (06CRS55356)	No Error

STATE v. McMAHAN No. 09-408	Buncombe (07CRS63711) (08CRS288) (07CRS63714)	No Error
STATE v. MOORE No. 09-11	Mecklenburg (07CRS240086) (07CRS240088) (07CRS57597) (07CRS240084)	No prejudicial error
STATE v. MOORE No. 09-801	Mecklenburg (07CRS62016) (07CRS233910)	No Error
STATE v. PERRY No. 09-323	Guilford (07CRS85592) (07CRS24395)	No Error
STATE v. PORE No. 09-273	Moore (06CRS55446) (07CRS2190) (06CRS55445)	No Error
STATE v. RAMIREZ No. 09-168	Guilford (06CRS102498)	No prejudicial error
STATE v. SHORT No. 09-58	Columbus (07CRS448)	No Error
STATE v. THORNE No. 08-1598	Edgecombe (06CRS50562)	No prejudicial error in part; Dismissed in part; No error in part
STATE v. TYSON No. 09-185	Gaston (06CRS57448)	No Error
STATE v. VALVERE-LIBORIO No. 09-296	Forsyth (06CRS50775)	No Error
STATE v. WALLS No. 09-176	Iredell (06CRS13966) (06CRS54610)	No Error
STATE v. WEATHERLY No. 09-453	Guilford (08CRS80244) (08CRS80245) (08CRS80243)	Dismissed
STATE v. WHITE No. 09-475	Buncombe (08CRS152) (07CRS54836)	No Error
STOTTLEMYER v. CITY OF CHARLOTTE No. 09-435	Ind. Comm. (IC514648)	Affirmed

**NORTHWEST PROP. GRP., LLC v. TOWN OF CARRBORO**

[201 N.C. App. 449 (2009)]

NORTHWEST PROPERTY GROUP, LLC, PETITIONER v. TOWN OF CARRBORO; THE TOWN OF CARRBORO BOARD OF ALDERMEN; THE HONORABLE MARK CHILTON, IN HIS OFFICIAL CAPACITY; JOAL HALL BROUN, DAN COLEMAN, JACQUELYN GIST, JOHN HERRERA, RANDEE HAVEN-O'DONNELL, ALEX ZAFFRON, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE TOWN OF CARRBORO BOARD OF ALDERMEN, RESPONDENTS

No. COA08-929

(Filed 22 December 2009)

**1. Zoning— special use permit—standard of judicial review**

The trial court applied the correct standard of review in examining the lawfulness of a Board of Aldermen (Board) decision to adopt conditions to a conditional use permit. Although the trial court stated that the reviewing court will normally defer to a Board within limits, nothing in the court's order indicates that it utilized this standard in reviewing any issue to which the whole record test applied.

**2. Zoning— special use permit—application in full compliance—conditions—authority**

The Board of Alderman (Board) did not exceed its authority under a zoning ordinance adopting the challenged conditions to a special use permit after voting that the permit application complied with the requirements of the ordinance. Although petitioners argued that mandatory language in the ordinance requires that the permit be granted unconditionally if it is facially complete and in compliance with the ordinance, the more appropriate reading of the ordinance is that the Board, after it votes that the application complies with requirements, still has the right to deny the application or adopt conditions pursuant to ordinance sections.

**3. Zoning— special use permit—conditions—findings**

The trial court erred by not finding that the Board of Aldermen (Board) committed an error of law where the Board did not make any findings justifying the imposition of conditions on the granting of a special use permit. The matter was remanded for a new decision addressing all of the issues.

Judge ROBERT C. HUNTER concurs in part and dissents in part.

**NORTHWEST PROP. GRP., LLC v. TOWN OF CARRBORO**

[201 N.C. App. 449 (2009)]

Appeal by petitioner from order entered 25 April 2008 by Judge R. Allen Baddour, Jr., in Orange County Superior Court. Heard in the Court of Appeals 10 February 2009.

*Nexsen Pruet, PLLC, by M. Jay DeVaney and Brian T. Pearce, for petitioner-appellant.*

*The Brough Law Firm, by Michael T. Brough, for respondent-appellees.*

ERVIN, Judge.

Northwest Property Group, LLC (Petitioner) appeals from a Memorandum and Order entered by the trial court on 25 April 2008 on certiorari review of the 25 September 2007 decision of the Town of Carrboro's (Town) Board of Aldermen (Board) to grant a conditional use permit (permit) to Petitioner subject to certain conditions, including two conditions to which petitioner objects. After careful consideration of the record in light of the applicable law, we conclude that the trial court erred by failing to find that the Board did not make the findings of fact required to support the addition of the challenged conditions to the permit and that this matter should be remanded to the trial court for further remand to the Board for the making of a new decision that addresses all of the issues that arise as the result of Petitioner's application for the issuance of a permit.

### I. Factual Background

On 8 June 2006, Petitioner applied to the Town for the issuance of a permit allowing the development of a 7.1 acre tract of real property (property) located at the intersection of Jones Ferry Road and Barnes Street in Carrboro, North Carolina. As part of the development process, Petitioner had engaged in negotiations with Harris-Teeter to build and operate a grocery store on the property. In addition, Petitioner's development plans contemplated the construction of two additional buildings that would house other commercial establishments. The plans for the development proposed for the property included unrestricted access to the property from Barnes Street.

As part of the application process, Petitioner provided the Town with a Traffic Impact Analysis (traffic study) that concluded that the estimated increase in traffic on Barnes Street did not meet North Carolina Department of Transportation (NCDOT) Standards for the addition of a traffic signal or roundabout. According to the traffic

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study, the proposed development was expected to generate over 5,000 vehicle trips per day, approximately 25% of which would involve use of Barnes Street to access the development site. The traffic study indicated that ten accidents had occurred at the intersection of Jones Ferry Road and Barnes Street during the past five years and that the “intersection of Jones Ferry Road and Barnes Street ranks as the third worst intersection in Carrboro, in terms of crash severity at high speed intersections[.]” The traffic study concluded with respect to the intersection of Jones Ferry Road and Barnes Street and the proposed Barnes Street access point that “the intersection will operate at an acceptable level of service during both the A.M. and P.M. peak hours.”

The Town’s Planning Staff (Staff) issued a report (Staff Report) that recommended that the Board grant the proposed permit subject to certain conditions, including a proposed condition providing:

That additional right-of-way at the corner of Barnes Street and Jones Ferry Road be dedicated to the Town of Carrboro and NCDOT for the possible future construction of a round about at this intersection prior to the Certificate of Occupancy being issued for the proposed buildings. Amount [sic] of right of way dedication shall be sufficient to construct 120 foot diameter roundabout.

Petitioner “agree[d] to comply with this recommendation, assuming that the roundabout is centered on the existing intersection.” The Staff Report did not propose any limitation relating to the use of the proposed Barnes Street ingress and egress point.

A number of Town advisory boards made recommendations relating to the proposed Barnes Street ingress and egress point. The Planning Board suggested that Petitioner “take[] measures, including signage and tenant regulations, to prevent delivery trucks from using the Barnes Street ingress/egress” point. Petitioner agreed to comply with this recommendation. In addition, the Planning Board stated:

Planning Board strongly supports the Board of Alderm[e]n in negotiations with NCDOT that will bring some resolution of serious safety concerns at the intersection of Jones Ferry. Particularly, the Planning Board wants a clearly marked crosswalk on the north side of Jones Ferry, and some form of signalization at this intersection, a flashing warning light at the very least if not a traffic light.

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The Transportation Advisory Board (TAB) recommended “[t]hat . . . delivery, service and/or dumpster traffic be prohibited via the Barnes Street [ingress and egress] point.” Petitioner agreed to this recommendation as well. In addition, the TAB proposed that the Barnes Street ingress and egress point be limited to incoming traffic only; however, Petitioner declined to accept this recommendation on the grounds that Harris-Teeter would “not proceed with involvement in this project without two means of ingress and egress.” Since NCDOT regulations precluded multiple access points onto the property from Jones Ferry Road, Petitioner contended that the additional ingress and egress point required by Harris-Teeter would have to be built on Barnes Street.

On 18 September 2007, a public hearing was held on Petitioner’s application. At that hearing, a number of citizens expressed concern about the impact of the proposed development on nearby neighborhoods, with the stated concerns including references to “the dangerous traffic” pattern that would result from the creation of the Barnes Street ingress and egress point. The hearing on Petitioner’s application was continued until 25 September 2007.

On or about 24 September 2007, a group of “[r]esidents of Lincoln Park” submitted a petition to the Board requesting denial of the application unless vehicular access to the proposed development from Barnes Street was prohibited. According to the Lincoln Park residents:

Under the current layout, developers estimate that at least 1,250 additional vehicles per day would use Barnes Street for access to the [development]; this vehicle load will be dangerous for pedestrians, bicyclists, and drivers, and will negatively impact the surrounding neighborhood due to noise and air pollution. This road was designed as a residential street and should remain one.

In light of the concerns expressed by the residents of the neighborhood, Petitioner agreed to “move the Barnes Street driveway approximately 160 feet north [towards Jones Ferry Road] to help reduce the project’s effect on the Barnes Street residences.” However, Petitioner insisted, given Harris-Teeter’s need for multiple points of entrance, that the Barnes Street ingress and egress point be retained.

As scheduled, a second public hearing was conducted on 25 September 2007. At that hearing, additional Carrboro citizens testified about their concerns relating to the proposed Barnes Street

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ingress/egress point. After the 25 September 2007 public hearing was closed, the following proceedings occurred:

MOTION WAS MADE BY ALEX ZAFFRON AND SECONDED BY JOHN HERRERA THAT THE APPLICATION IS COMPLETE. VOTE: AFFIRMATIVE ALL.

MOTION WAS MADE BY ALEX ZAFFRON AND SECONDED BY JOHN HERRERA THAT THE APPLICATION COMPLIES WITH ALL APPLICABLE REQUIREMENTS OF THE LAND USE ORDINANCE. VOTE: AFFIRMATIVE ALL.

MOTION WAS MADE BY ALEX ZAFFRON AND SECONDED BY JOHN HERRERA THAT IF THE APPLICATION IS GRANTED, THE PERMIT SHALL BE ISSUED SUBJECT TO THE FOLLOWING CONDITIONS: . . . VOTE: AFFIRMATIVE SIX, NEGATIVE ONE (BROUN).

The effect of the Board's decision was to conclude that the Petitioner's application was complete, that it "comple[d] with all applicable requirements of the Land Use Ordinance," and that the Permit should be approved, subject to 37 conditions. Although Petitioner had agreed to the vast majority of the conditions attached to the Permit by the Board, it objected to the following conditions:

- (2) If any of the conditions affixed hereto or any part thereof shall be held invalid or void, then this permit shall be void and of no effect.

. . . .

- (15) The relocated entrance/exit onto Barnes Street . . . will be restricted to emergency use only and that appropriate bollards or other physical devices shall be erected to prevent the movement of traffic other than emergency vehicles.<sup>1</sup>

On 23 October 2007, Petitioner filed a Petition For Writ Of Certiorari with the Orange County Superior Court in which it contested the validity of Condition Nos. 2 and 15. On 20 November 2007, Petitioner's petition was granted for the purpose of allowing review of the Board's decision. Petitioner's substantive challenge to the Board's decision was heard before the trial court on 17 March

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1. The condition quoted in the text as Condition No. 15 is taken from the Board's meeting minutes. The identical condition in the issued permit is stated as Condition No. 14. We will refer to the disputed conditions as Condition Nos. 2 and 15 or as the "challenged conditions" in the remainder of this opinion.

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2008. On 25 April 2008, the trial court entered a Memorandum and Order upholding the Board's decision to adopt the challenged conditions. Petitioner noted an appeal to this Court from the trial court's decision.

## II. Legal Analysis

### A. General Legal Authority Applicable to Judicial Review of Municipal Decisions Granting, Denying or Conditioning Approval of Conditional Use Permits

The General Assembly authorized municipalities to issue conditional use permits in N.C. Gen. Stat. § 160A-381(c), which provides, in pertinent part, that:

[T]he board of adjustment or the city council may issue special use permits or conditional use permits in the classes of cases or situations [set forth in the zoning ordinance] and in accordance with the principles, conditions, safeguards and procedures specified therein and may impose reasonable and appropriate conditions and safeguards upon these permits.

"The general law of zoning indicates that a condition imposed on a conditional use permit is improperly imposed when it is not related to the use of the land, the control, ownership, or transfer of property[;] it unreasonably affects the way in which business on the property can be conducted[;] or it conflicts with a zoning ordinance." *Overton v. Camden Cty.*, 155 N.C. App. 100, 104, 574 S.E.2d 150, 153 (2002). "This Court has regularly upheld conditions attached to the issuance of [conditional] use permits[.]" *MCC Outdoor, LLC v. Town of Franklinton Bd. of Comm'rs*, 169 N.C. App. 809, 815, 610 S.E.2d 794, 798, *disc. review denied*, 359 N.C. 634, 616 S.E.2d 540, *appeal dismissed*, 359 N.C. 634, 616 S.E.2d 539 (2005) (citation omitted).

At such time as an applicant for a conditional use permit has "produce[d] competent, material, and substantial evidence of compliance with all ordinance requirements, the applicant has made a *prima facie* showing of entitlement to a permit." *SBA, Inc. v. City of Asheville City Council*, 141 N.C. App. 19, 27, 539 S.E.2d 18, 22 (2000) (citation omitted). After an applicant has made the required showing, the burden of establishing that approval of a conditional use permit would endanger the public health, safety, and welfare shifts to those opposing issuance of the permit. *See Woodhouse v. Board of Commissioners*, 299 N.C. 211, 219, 261 S.E.2d 882, 888 (1980). The denial of a conditional use permit must be predicated upon findings

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of fact which are supported by competent, material, and substantial evidence appearing in the record. *See SBA*, 141 N.C. App. at 27, 539 S.E.2d at 22. For that reason, a municipal governing body may not deny or condition a conditional use permit based upon the exercise of its unguided discretion or upon a standardless determination that approval of the application would adversely affect some generic view of the public interest. *See In re Application of Ellis*, 277 N.C. 419, 425, 178 S.E.2d 77, 81 (1970).

In reviewing a decision made by a municipal board sitting as a quasi-judicial body for the purpose of evaluating an application for the issuance of a conditional use permit, the role of the trial court is limited to:

- (1) Reviewing the record for errors in law,
- (2) Insuring that procedures specified by law in both statute and local ordinance are followed,
- (3) Insuring that the due process rights of the petitioner are protected, including the right to offer evidence, to cross-examine witnesses, and to inspect documents,
- (4) Insuring that the decision of the town board is supported by competent, material and substantial evidence in view of the whole record, and
- (5) Insuring that the town board's decision is not arbitrary and capricious.

*Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 626, 265 S.E.2d 379, 383, *rehearing denied*, 300 N.C. 562, 270 S.E.2d 106 (1980). "A reviewing court will normally defer to a board of adjustment so long as a condition is reasonably related to the proposed use, does not conflict with the zoning ordinance, and furthers a legitimate objective of the zoning ordinance." *Overton*, 155 N.C. App. at 398, 574 S.E.2d at 153 (citing *Chambers v. Board of Adjustment*, 250 N.C. 194, 195, 108 S.E.2d 211, 213 (1959)). However, "in making a decision on an application for a [conditional] use permit, the Council may not arbitrarily violate its own rules, but must comply with the provisions of its Ordinance." *Clark v. City of Asheboro*, 136 N.C. App. 114, 119, 524 S.E.2d 46, 50 (1999).

In examining either the sufficiency of the evidence or whether the board's decision was arbitrary and capricious, the trial court applies the "whole record test." *Westminster Homes, Inc. v. Town of*

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*Cary Zoning Bd. of Adjust.*, 140 N.C. App. 99, 102, 535 S.E.2d 415, 417 (2000), *aff'd*, 354 N.C. 298, 554 S.E.2d 634 (2001). “The “whole record” test requires the reviewing court to examine all the competent evidence . . . which comprises the “whole record” to determine if there is substantial evidence in the record to support the [quasi-judicial body’s] findings and conclusions.’” *Sun Suites Holdings, LLC v. Board of Aldermen of Town of Garner*, 139 N.C. App. 269, 273, 533 S.E.2d 525, 528, *writ of supersedeas and disc. review denied*, 353 N.C. 280, 546 S.E.2d 397 (2000) (quoting *Ellis v. N.C. Crime Victims Compensation Comm.*, 111 N.C. App. 157, 162, 432 S.E.2d 160, 163-64 (1993)). “The ‘whole record’ test does not allow the reviewing court to replace the Board’s judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*.” *Thompson v. Board of Education*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977). Errors of law, on the other hand, are reviewed *de novo*. *Westminster Homes*, 140 N.C. App. at 102, 535 S.E.2d at 417.

Upon appeal from a trial court’s order addressing the lawfulness of a municipal board’s decision concerning an application for approval of a conditional use permit, the appellate court is limited to determining whether the trial court applied the correct standard of review and whether it correctly applied that standard. *Id.*, 140 N.C. App. at 102-03, 535 S.E.2d at 417. “In reviewing the sufficiency and competency of the evidence at the appellate level, the question is not whether the evidence before the superior court supported that court’s order but whether the evidence before the town board was supportive of its action.” *Concrete Co.*, 299 N.C. at 626, 265 S.E.2d at 383. In light of these basic principles, we will now address Petitioner’s challenges to the validity of the trial court’s order upholding the Board’s decision to issue the requested permit subject to the two challenged conditions.

B. The Trial Court Utilized the Correct Standard of Review

[1] On appeal, Petitioner initially contends that the trial court failed to apply the correct standard of review in examining the lawfulness of the Board’s decision to adopt the two challenged conditions. In support of this contention, Petitioner argues that it had “requested that the Superior Court review the decision of the . . . Board to ensure it was (i) supported by competent, material and substantial evidence and (ii) was not arbitrary and capricious” and that “the Court was to apply the whole record test to conduct this review.” On the other

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hand, Petitioner argued that Respondents contended that “the Superior Court could only review whether the . . . Board erred in determining Condition 15 was reasonable” and that the trial court could “only apply *de novo* review to determine this question.” Although Petitioner acknowledges that the trial court included a section entitled “Applicable Law” in its Memorandum and Order and does not appear to quarrel with the accuracy of any specific statement made in that portion of the trial court’s order, Petitioner notes that the trial court quoted language from our *Overton* decision suggesting the appropriateness of giving a certain amount of deference to the judgment of the local governmental body in dealing with certain conditioning issues, *Overton*, 155 N.C. App. at 398, 574 S.E.2d at 163, and argues that “[t]he deference standard **does not apply** when a court is conducting a whole record review to determine the sufficiency of the evidence to support a condition or whether a town board acted arbitrarily and capriciously in attaching a condition (emphasis in original).” As a result, Petitioner urges us to remand this case to the trial court for a more definitive statement of the standard of review that it employed in examining the validity of the Board’s decision in the event that we do not find that its decision lacked adequate evidentiary support or that the Board acted arbitrarily and capriciously.

A careful review of the trial court’s order, however, indicates that it correctly quoted and applied the proper standard of review. More particularly, the trial court acknowledged the applicability of the five factors enumerated in *Concrete Co.*, 299 N.C. at 626, 265 S.E.2d at 383. In addition, the trial court explicitly stated that “[t]he court is to apply the ‘whole record’ test when reviewing either the sufficiency of the evidence, or whether the Board’s decision was arbitrary and capricious, and errors of law are reviewed *de novo*.” Although the trial court did, as Petitioner notes, state in reliance on *Overton* that “[a] reviewing court will normally defer to a Board so long as a condition is reasonably related to the proposed use, does not conflict with the zoning ordinance, and furthers a legitimate objective of the zoning ordinance,” nothing in the trial court’s order indicates that it utilized this standard in reviewing any issue to which the “whole record” test actually applied. Furthermore, we have seen nothing in the trial court’s order to suggest that it failed to apply the correct standard of review in addressing Petitioner’s specific challenges to the lawfulness of the Board’s actions. As a result, we conclude that the trial court applied the correct standard of review and will proceed to examine the extent, if any, to which it correctly applied the appli-

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cable standard to Petitioner's challenges to the Board's actions, which we will address in logical order rather than in the order in which Petitioner has advanced them in its brief.

C. The Board Did Not Violate the Land Use Ordinance by Adopting the Additional Conditions to Which Petitioner Objects

[2] In its brief, Petitioner contends, with the agreement of our dissenting colleague, that the Board failed to comply with applicable local ordinance provisions and that, given the manner and order in which the Board acted, it was required to issue the requested permit without the challenged conditions.<sup>2</sup> After carefully reviewing the record in light of the relevant ordinance provisions of the Town's Land Use Ordinance (ordinance), we disagree.

The substantive rules and procedures that the Board is required to follow in connection with the consideration of applications for the issuance of Conditional Use Permits are specified in the ordinance. According to Section 15-54:

- (a) An application for a special use permit shall be submitted to the board of adjustment by filing a copy of the application with the administrator in the planning department.
- (b) An application for a conditional use permit shall be submitted to the Board of Aldermen by filing a copy of the application with the administrator in the planning department.
- (c) The board of adjustment or Board of Aldermen, respectively, shall issue the requested permit unless it concludes, based upon the information submitted at the hearing, that:
  - (1) The requested permit is not within its jurisdiction according to the table of permissible uses;
  - (2) The application is incomplete, or
  - (3) If completed as proposed in the application, the development will not comply with one or more requirements of this chapter (not including those the applicant is not

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2. Although Petitioner advances the "mandatory issuance" argument discussed in the text in its brief, it has not assigned the trial court's failure to adopt this argument as error. However, given the possibility that the Board may have committed "fundamental error," *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008), we have concluded that we should examine this issue on "the merits despite the occurrence of default" in accordance with the authority granted pursuant to N.C.R. App. P. 2.

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required to comply with under the circumstances specified in Article VIII, Nonconforming Situations);

- (4) If completed as proposed, the development, more probably than not:
  - (a) Will materially endanger the public health or safety; or
  - (b) Will substantially injure the value of adjoining or abutting property; or
  - (c) Will not be in harmony with the area in which it is to be located; or
  - (d) Will not be in general conformity with the Land Use Plan, Thoroughfare Plan, or other plans officially adopted by the Board.

Section 15-58, which addresses “Board Action On Special Use and Conditional Use Permits,” provides that:

In considering whether to approve an application for a special or conditional use permit, the board of adjustment or the Board of Aldermen shall proceed according to the following format:

- (1) The board shall consider whether the application is complete. If no member moves that the application be found incomplete (specifying either the particular type of information lacking or the particular requirement with respect to which the application is incomplete) then this shall be taken as an affirmative finding by the board that the application is complete.
- (2) The board shall consider whether the application complies with all of the applicable requirements of this chapter. If a motion to this effect passes, the board need not make further findings concerning such requirements. If such a motion fails or is not made then a motion shall be made that the application be found not in compliance with one or more of the requirements of this chapter. Such a motion shall specify the particular requirements the application fails to meet. Separate votes may be taken with respect to each requirement not met by the application. It shall be conclusively presumed that the application complies with all requirements not found by the board to be unsatisfied through this process.

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- (3) If the board concludes that the application fails to comply with one or more requirements of this chapter, the application shall be denied. If the board concludes that all such requirements are met, it shall issue the permit unless it adopts a motion to deny the application for one or more of the reasons set forth in Subdivision 15-54(c)(4). Such a motion shall propose specific findings, based upon the evidence submitted, justifying such a conclusion.

Finally, Section 15-59 addresses the issue of “Additional Requirements on Special Use and Conditional Use Permits” and states that:

- (a) Subject to subsection (b), in granting a special or conditional use permit, the board of adjustment or Board of Aldermen, respectively, may attach to the permit such reasonable requirements in addition to those specified in this chapter as will ensure that the development in its proposed location:
- (1) Will not endanger the public health or safety;
  - (2) Will not injure the value of adjoining or abutting property;
  - (3) Will be in harmony with the area in which it is located; and
  - (4) Will be in conformity with the Carrboro Land Use Plan, Thoroughfare Plan, or other plan officially adopted by the Board.
- (b) The permit-issuing board may not attach additional conditions that modify or alter the specific requirements set forth in this ordinance unless the development in question presents extraordinary circumstances that justify the variation from the specified requirements.
- . . . .
- (e) All additional conditions or requirements authorized by this section are enforceable in the same manner and to the same extent as any other applicable requirement of this chapter.

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- (f) A vote may be taken on additional conditions or requirements before consideration of whether the permit should be denied for any of the reasons set forth in Subdivision 15-54(c)(3) or (4).

Based upon its analysis of these provisions, Petitioners, with the agreement of the dissent, contend that, in order to attach a condition to a permit, the Board must first establish a basis for the denial of a permit and make specific findings in support of that determination. After making the necessary findings, the Board then has the discretion to adopt appropriate conditions so as to allow approval of the permit. On the other hand, in the event the Board is faced with an application that is facially complete, in compliance with the ordinance, and not subject to denial under Section 15-54, the Board has no alternative except to grant the permit unconditionally given the mandatory language found in Section 15-54(c). Given that the Board voted that the application was complete and was in compliance with the ordinance, and that the Board did not make findings justifying denial of the application under Section 15-54(c)(4), Petitioner and our dissenting colleague conclude that the Board lost its authority to adopt additional conditions since the only purpose of the conditioning authority granted by the ordinance was to bring an otherwise non-compliant application into compliance. After careful study of the relevant ordinance provisions, we cannot agree with this construction of the ordinance.

The fundamental source of our disagreement with this logic is that it rests upon a misreading of the applicable ordinance provisions. In essence, the Petitioner and the dissent understand permit approval and the conditioning process to be two sides of the same coin, while we believe that permit approval and conditioning are two different things. A proper resolution of this difference of opinion requires an examination of the language of the relevant ordinance provisions.

According to Section 15-54, “[t]he board of adjustment or Board of Aldermen, respectively, *shall* issue the requested permit unless it concludes, based upon the information submitted at the hearing,” that (1) “[t]he requested permit is not within its jurisdiction;” (2) “[t]he application is incomplete;” (3), “[i]f completed as proposed in the application, the development will not comply with one or more requirements of this chapter;” or (4), “[i]f completed as proposed, the development, more probably than not,” “[w]ill materially endanger the public health or safety;” “substantially injure the value of adjoining

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ing or abutting property;” “not be in harmony with the area in which it is to be located;” or “not be in general conformity with the Land Use Plan, Thoroughfare Plan, or other plans officially adopted by the Board (emphasis added).” Nothing in Section 15-54 in any way addresses the issue of conditions, which is covered in Section 15-59(a). Section 15-59(a) provides that, “in granting a special or conditional use permit, the board of adjustment or Board of Aldermen, respectively, may attach to the permit such reasonable requirements in addition to those specified in this chapter as will ensure that the development in its proposed location” “[w]ill not endanger the public health and safety;” “[w]ill not injure the value of adjoining or abutting property;” [w]ill be in harmony with the area in which it is located;” and “[w]ill be in conformity with the Carrboro Land Use Plan, Thoroughfare Plan, or other Plan officially adopted by the Board.” However, according to Section 15-59(b), the Board “may not attach additional conditions that modify or alter the specific requirements set forth in this ordinance unless the development in question presents extraordinary circumstances that justify the variation from the specified requirements.” As a result, the relevant provisions of the ordinance treat the decision as to whether to approve a request for the issuance of a conditional use permit and the issue of whether to condition an awarded conditional use permit as two separate and distinct issues.

A similar dichotomy appears in the ordinance provisions governing the procedures to be followed by the Board in considering applications for approval of conditional use permits. According to Section 15-58(1), in deciding whether to issue a conditional use permit, “[t]he board shall [first] consider whether the application is complete.” Assuming that the applicant overcomes that hurdle, “the board shall [next] consider whether the application complies with all of the applicable requirements of this chapter.” Section 15-58(2). “If the board concludes that the application fails to comply with one or more of the requirements of this chapter, the application shall be denied.” Section 15-58(2). “If the board concludes that” the “requirements of this chapter” “are met,” “it shall issue the permit unless it adopts a motion to deny the application for one or more of the reasons set forth in” Section 15-54(c)(4). Section 15-58(3). “A vote may be taken on additional conditions or requirements before consideration of whether the permit should be denied for any of the reasons set forth in” Section 15-54(c)(3) or (4). Section 15-59(f). As a result, the relevant procedural provisions of the ordinance provide for separate con-

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sideration of (1) whether the application is complete; (2) whether the application “complies with all of the applicable requirements of this chapter;” (3) whether an application should be denied “for one or more of the reasons set forth in” Section 15-54(c)(4); and (4) whether conditions should be imposed pursuant to Section 15-59(a).

According to its minutes, the Board initially decided that Petitioner’s application was complete and that it complied with the provisions of the ordinance. Contrary to the position espoused by Petitioner and the dissent, the second decision did not preclude the adoption of the conditions approved in the third decision for two different reasons. First, the effect of the second of the Board’s decisions was not that all issues necessary to the approval of the proposed permit had been addressed; instead, the effect of that decision was simply that the criterion enunciated in Section 15-54(c)(3) had been complied with. In view of the fact that compliance with Section 15-54(c)(4) was necessary in order for the proposed conditional use permit to win Board approval and the fact that the Board retained the right to deny the proposed permit pursuant to Section 15-54(c)(4), the second Board vote simply did not necessitate approval of Petitioner’s permit application without the imposition of additional conditions. Secondly, and perhaps more importantly, nothing in the ordinance precludes the imposition of otherwise appropriate conditions on an approved application despite votes of the nature recorded in the Board’s minutes or even a vote to approve the issuance of a conditional use permit. The fact that Section 15-59(a) addresses the issue of conditioning in a completely separate section of the ordinance from that addressing the issue of permit approval or disapproval and the fact that Section 15-59(f) permits, but does not require, the issue of whether to adopt conditions to be considered prior to the point in time at which the Board decides whether to approve or disapprove a proposed conditional use permit necessarily implies that the adoption of conditions can be considered after that point in time as well. As a result, we conclude that the Board did not lose the ability to adopt additional conditions at the time that it approved a motion to the effect that “the application complies with all applicable requirements of the land use ordinance.” Instead, we believe that the more appropriate reading of the relevant ordinance provisions is that, once the Board voted that “the application complied with all applicable requirements of the land use ordinance,” it still had the right to either (1) deny the application pursuant to Section 15-54(c)(4) or to (2) adopt conditions pursuant to Section 15-59(a), and that its decision to

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adopt conditions pursuant to Section 15-59(a) in lieu of either approving the application without further modification or denying the application pursuant to Section 15-54(c)(4) was consistent with the relevant provisions of the ordinance.

The dissent reaches a contrary conclusion by attempting to read Section 15-54(c) in conjunction with Section 15-59(a). According to the dissent, if the permit does not comply with any one of the components of Section 15-54(c)(4), the Board has the authority to deny the permit, and the Board must have grounds for denying the proposed permit in order to impose conditions since the purpose of imposing conditions is to allow the permit to be approved. There are two fundamental problems with this logic. First, this argument assumes, rather than demonstrates, that the only purpose of imposing conditions pursuant to Section 15-59(a) is to bring a proposed application into compliance with the ordinance. No provision of the ordinance explicitly states such a requirement, and we are unwilling to infer the existence of such a requirement because the same language appears in both Section 15-54(c)(4) and Section 15-59(a). Secondly, and perhaps more importantly, the second motion adopted by the Board appears to have been intended to address the criterion set out in Section 15-54(c)(3) rather than all of the criteria that must be satisfied before a valid conditional use permit can be issued, including those set out in Section 15-54(c)(4). We reach this conclusion for a number of reasons, including (1) the similarity between the language of Section 15-58(2), which is the procedural section upon which our dissenting colleague relies, and Section 15-54(c)(3) and (2) the fact that Section 15-58(3) clearly indicates that the motion contemplated by Section 15-58(2) is not intended to address the extent to which the proposed project complies with Section 15-54(c)(4). As a result, we do not believe that the Board's conditioning authority under the ordinance is limited to the adoption of conditions that permit the approval of a proposed conditional use permit.

Thus, for all of the reasons set forth above, we conclude that the Board did not exceed its authority under the ordinance by adopting the challenged conditions after voting that "the application complie[d] with all applicable requirements of the land use ordinance." As a result, the Board had the authority, assuming that its actions were otherwise consistent with the ordinance and the applicable law, to adopt the challenged conditions.

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D. The Board Erred by Failing to Make Findings of Fact in Support of its Decision to Adopt the Challenged Conditions

[3] “The courts have required municipal agencies to make findings when ruling on an application for a special use permit, so that the reviewing court may properly determine whether the agency has acted lawfully and the parties will be informed of the grounds for the decision.” *Piney Mt. Neighborhood Assoc. v. Town of Chapel Hill*, 63 N.C. App. 244, 256, 304 S.E.2d 251, 258 (1983) (citation omitted). Having adopted the challenged conditions pursuant to its authority under Section 15-59(a), the Board was required by well-established principles of North Carolina law to make findings of fact justifying its decision to impose the challenged conditions. *Crist v. City of Jacksonville*, 131 N.C. App. 404, 405, 507 S.E.2d 899, 900 (1998) (stating that “[f]indings of fact are an important safeguard against arbitrary and capricious action by the Board of Adjustment because they establish a sufficient record upon which this Court can review the Board’s decision” and holding that, although “neither N.C. Gen. Stat. § 160A-388[,] . . . nor section 25-33 of the Jacksonville City Code[,] [explicitly] . . . requires findings of fact in denying a variance,” a remand for such findings was necessary). A careful examination of the Board’s decision discloses that it completely failed to make any factual findings justifying its decision to adopt the challenged conditions over Petitioner’s objection. As a result, the trial court erred by failing to find that the Board committed an error of law due to its failure to make factual findings in support of its decision to impose the challenged conditions. Given the existence of this error, this case should be remanded to the trial court for further remand to the Board with instructions to reconsider Petitioner’s application for the issuance of a conditional use permit and to enter a new decision containing appropriate findings of fact addressing all of the material issues raised by Petitioner’s application. In light of the necessity for this matter to receive further consideration from the Board, we need not resolve the hotly-debated issue concerning the extent to which the criteria set out in Section 15-59(a) should be viewed in the conjunctive or the disjunctive, since the manner in which the Town applies the ordinance will be revealed by any findings of fact that it ultimately makes and since it would be premature for us to address this issue in the absence of proper findings of fact explaining the manner in which the Board applies the relevant ordinance provision.

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E. Other Issues

In addition to challenging the Board's compliance with the relevant provisions of the Land Use Ordinance, Petitioner advances a number of other arguments, including contentions that the Board's decision to adopt the challenged conditions lacked sufficient evidentiary support, that the Board's decision to adopt the challenged conditions was arbitrary and capricious, that the challenged conditions attached to the permit were unreasonable as a matter of law, and that the trial court should have modified the permit without the necessity for further proceedings on remand. Having concluded that the Board failed to make sufficient findings of fact to support the imposition of the challenged conditions, we do not believe that it is necessary or appropriate for us to address these issues at this time to the extent that we have not already done so. Having decided that the Board should make a new decision containing proper findings of fact addressing the material issues raised by Northwest's application for a conditional use permit, we should not presume that the Board will necessarily adopt the same conditions on remand that were adopted at the original proceeding or that we are in a position to ascertain the exact nature of the factual findings that the Board will make in support of any conditions that it chooses to impose. On the contrary, we can only determine whether the factual findings that the Board actually makes have sufficient evidentiary support or whether any decision that the Board makes based upon those factual findings is arbitrary, capricious, or unreasonable after the Board has actually made its decision on remand. As a result, we believe that the most appropriate course is for us to simply remand this case to the trial court for further remand to the Board for the making of a new decision that addresses all of the issues that arise as a result of Petitioner's application for the issuance of a conditional use permit and to leave the remaining issues that Petitioner has brought to our attention for decision on another day, assuming that those issues ever need to be decided. *City of Jacksonville*, 131 N.C. App. at 406, 507 S.E.2d at 900 (concluding that, given the board's failure to make findings of fact, the appropriate remedy was "remand [] to the Board of Adjustment to make findings of fact to support their decision"). As a result, we do not believe that it is appropriate for us to attempt to address the remaining issues that Petitioner has discussed in its brief and will decline to do so at this time.

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III. Conclusion

Thus, for the reasons set forth above, we conclude that the trial court erred by failing to determine that the Board did not make sufficient findings of fact to support the challenged conditions. As a result, we reverse the trial court's order and remand this case to the trial court for further remand to the Board for the making of a new decision that addresses all of the issues that arise as the result of Petitioner's application for the issuance of a conditional use permit.

REVERSED AND REMANDED.

Judges WYNN concurs.

Judge ROBERT C. HUNTER concurs in part and dissents in part by separate opinion.

HUNTER, Robert C., Judge, concurring in part and dissenting in part.

After careful review, I concur with the Court's conclusion that the Town of Carrboro ("the Town") erroneously failed to make the findings of fact required as a prerequisite for imposing the conditions to which Northwest Property Group, LLC ("Northwest") objects in connection with the approval of the conditional use permit. I respectfully dissent from those portions of the Court's opinion that conclude that the Town's Board of Alderman ("the Board") did not violate the Town's Land Use Ordinance when it adopted the challenged conditions. This case should be remanded to the trial court with instructions to strike conditions two and fifteen and then remand to the Board to reissue the permit without those conditions.

Analysis

## I. Standard of Review

With regard to the standard of review for the trial court upon writ of certiorari:

[I]t is clear that the task of a court reviewing a decision on an application for a conditional use permit made by a town board sitting as a quasi-judicial body includes:

- (1) Reviewing the record for errors in law,
- (2) *Insuring that procedures specified by law in both statute and ordinance are followed,*

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- (3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,
- (4) Insuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and
- (5) Insuring that decisions are not arbitrary and capricious.

*Coastal Ready-Mix Concrete Co., Inc. v. Board of Comm'rs of Nags Head*, 299 N.C. 620, 626, 265 S.E.2d 379, 383 (1980) (emphasis added). "The superior court is not the trier of fact but rather sits as an appellate court and may review both (i) sufficiency of the evidence presented to the municipal board and (ii) whether the record reveals error of law." *Capricorn Equity Corp. v. Town of Chapel Hill*, 334 N.C. 132, 136, 431 S.E.2d 183, 186 (1993).

This Court's standard of review of a superior court order upon writ of certiorari is as follows:

(1) to determine whether the trial court exercised the proper scope of review, and (2) *to review whether the trial court correctly applied this scope of review*. When a party alleges an error of law in the Council's decision, the reviewing court examines the record *de novo*, considering the matter anew. However, when the party alleges that the decision is arbitrary and capricious or unsupported by substantial competent evidence, the court reviews the whole record. Denial of a conditional use permit must be based upon findings which are supported by competent, material, and substantial evidence appearing in the record.

*Humane Soc'y of Moore Cty., Inc. v. Town of Southern Pines*, 161 N.C. App. 625, 629, 589 S.E.2d 162, 165 (2003) (quotation marks and internal citations omitted) (emphasis added). In reviewing the 25 April 2008 Order, I agree with the majority's determination that the trial court exercised the proper scope of review. The "Applicable Law" section of the order accurately states the role of the trial court. Particularly, with regard to what will be discussed *infra*, the trial court acknowledged the five factors to be considered by the court. *Coastal Ready-Mix Concrete Co.*, 299 N.C. at 626, 265 S.E.2d at 383. The trial court also recognized that any conditions imposed on a conditional use permit must be reasonable. *Overton v. Camden Cty.*, 155 N.C. App. 100, 104, 574 S.E.2d 150, 153-54 (2002).

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The general law of zoning indicates that a condition imposed on a conditional use permit is improperly imposed when it is not related to the use of the land, the control, ownership, or transfer of property, it unreasonably affects the way in which business on the property can be conducted, *or it conflicts with a zoning ordinance*.

*Id.* (Emphasis added.)

Nevertheless, the trial court did not correctly apply the scope of review as there were procedural errors committed by the Board, in violation of the applicable ordinances, that were not identified by the trial court. *See Humble Oil & Refining Co. v. Bd. of Aldermen*, 284 N.C. 458, 467, 202 S.E.2d 129, 135 (1974) (“The procedural rules of an administrative agency are binding upon the agency which enacts them as well as upon the public[.]”) (quotation marks and citation omitted).

In addition to the ordinance violations, the trial court incorrectly held that the decision of the Board was supported by competent, material and substantial evidence, and therefore also erred in finding that the decision was not arbitrary and capricious. The majority opinion does not address these two issues; however, I choose to do so in order to demonstrate that there are no issues left to be resolved by the Board and therefore striking the conditions is the most appropriate remedy.

## II. Applicable Ordinances—Procedure

### A. Interpretation

The three Town ordinances that are applicable in this case with regard to the procedural requirements for approval or denial of a conditional use permit are Sections 15-54, 15-59, and 15-58.<sup>3</sup> Authority is granted to cities and towns to create such ordinances regulating conditional use permits via N.C. Gen. Stat. § 160A-381 (2007).<sup>4</sup>

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3. The ordinances in effect at the time of the Board’s decision are applied on appeal. *See Carolina Spirits, Inc. v. City of Raleigh*, 127 N.C. App. 745, 747, 493 S.E.2d 283, 285 (1997), *disc. review denied*, 347 N.C. 574, 498 S.E.2d 380 (1998).

4. As it relates to this case, N.C. Gen. Stat. § 160A-381(c) states that “reasonable and appropriate conditions” may be applied to conditional use permits; however, the exact terms of the ordinances enacted in each town must govern the approval process and imposition of conditions. *See Hewett v. County of Brunswick*, 155 N.C. App. 138, 144, 573 S.E.2d 688, 693 (2002) (“[A]ny such conditions [authorized by statute] must be specified in the ordinance.”).

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The Town of Carrboro Land Use Ordinance Section 15-54(c) states in pertinent part that a conditional use permit “shall” be issued “unless [the Board] concludes, based upon the information submitted at the hearing” that:

(4) If completed as proposed, the development, more probably than not:

- a) Will materially endanger the public health or safety; or
- b) Will substantially injure the value of adjoining or abutting property; or
- c) Will not be in harmony with the area in which it is to be located; or
- d) Will not be in general conformity with the Land Use Plan, Thoroughfare Plan, or other plan officially adopted by the Board.

These factors conform to those sanctioned in *Kenan v. Board of Adjustment*, 13 N.C. App., 688, 692-93, 187 S.E.2d 496, 499 (1972).

Ordinance Section 15-59(a) states in pertinent part:

[I]n granting a special or conditional use permit, . . . the Board of Aldermen . . . may attach to the permit *such reasonable requirements* in addition to those specified in this chapter *as will ensure that the development in its proposed location:*

- (1) Will not endanger the public health or safety;
- (2) Will not injure the value of adjoining or abutting property;
- (3) Will be in harmony with the area in which it is located; and
- (4) Will be in conformity with the Carrboro Land Use Plan, Thoroughfare Plan, or other plan officially adopted by the Board.

(Emphasis added.) Accordingly, if the permit application is not in compliance with any one of the terms of Section 15-54(c)(4), the Board may completely deny the permit. The reasonable conditions that may be imposed pursuant to Section 15-59 are meant to put the Conditional Use Permit in compliance with Section 15-54 so the permit can then be approved.

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Finally, Section 15-58 states in pertinent part:

In considering whether to approve an application for a special or conditional use permit, the board of adjustment or the Board of Alderman shall proceed according to the following format:

- (1) The board shall consider whether the application is complete. . . .
- (2) The board shall consider whether the application complies with all of the applicable requirements of this chapter. *If a motion to this effect passes, the board need not make further findings concerning such requirements.* If such a motion fails or is not made then a motion shall be made that the application be found not in compliance with one or more of the requirements of this chapter. Such a motion shall specify the particular requirements the application fails to meet. Separate votes may be taken with respect to each requirement not met by the application. *It shall be conclusively presumed that the application complies with all requirements not found by the board to be unsatisfied through this process.*
- (3) If the board concludes that the application fails to comply with one or more requirements of this chapter, the application shall be denied. *If the board concludes that all such requirements are met, it shall issue the permit unless it adopts a motion to deny the application for one or more of the reasons set forth in Subdivision 15-54(c)(4). Such a motion shall propose specific findings, based upon the evidence submitted, justifying such a conclusion.*

(Emphasis added.) This ordinance clearly dictates that if all requirements of the Land Use Ordinance are satisfied by the applicant, the Board “shall” issue the permit and need not make further findings. *Id.* However, if the Board finds that the permit is not in compliance with any of the terms set forth in Section 15-54(c)(4), then specific findings for *denial* are required, based on the evidence submitted. *Id.* The statement that “[i]t shall be conclusively presumed that the application complies with all requirements not found by the board to be unsatisfied through this process” reiterates the requirement that findings be made. *Id.*

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In sum, after reviewing these ordinances *in pari materia*, in order to apply conditions to a conditional use permit, the Board is required to first establish grounds for denying a permit pursuant to Section 15-54(c). Specific findings are required “justifying such a conclusion.” Section 15-58(3). Upon making the appropriate findings, the Board may then apply *reasonable* conditions to bring the permit back into compliance so that it can be granted.<sup>5</sup> Section 15-59(a). However, if the application is complete on its face, complies with the requirements of the Land Use Ordinance, and no information presented at the hearing leads to a denial under the guidelines of Section 15-54, the Board is required to grant the permit without conditions pursuant to the “shall” language contained in the ordinance. Section 15-54(c).<sup>6</sup>

The majority holds:

“[T]he more appropriate reading of the relevant ordinance provisions is that, once the Board voted that ‘the application complied with all applicable requirements of the land use ordinance,’ it still had the right to either (1) deny the application pursuant to Section 15-54(c)(4) or to (2) adopt conditions pursuant to Section 15-59(a).

The majority’s interpretation overlooks the “shall” language in the ordinance. Section 15-54(c) clearly states that the permit “*shall*” be issued unless, *inter alia*, “the development will not comply with one or more requirements of this chapter” or “if completed as proposed, the development, more probably than not[,]” will violate one of the enumerated factors set out in subsection (4). If the Board concludes, based on the evidence presented, that the permit as proposed violates Section 15-54(c)(4), then it must “adopt a motion to *deny* the application.” Section 15-58(3). The Board does not even reach the provisions of 15-59(a) governing conditions until it has found a violation of 15-54(c)(4) and made findings regarding the evidence to sup-

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5. “The board can impose additional unique, project-specific conditions on special and conditional permits. However, it is very important to note that the board does not have the authority to impose any conditions it wants. *Each condition must be related to bringing the project into compliance with the standards for decision already in the zoning ordinance.*” David W. Owens, *Introduction to Zoning* 63-64 (3d ed. 2007) [hereinafter Owens] (emphasis added).

6. I recognize that in the case of *Ward v. Inscove*, 166 N.C. App. 586, 603 S.E.2d 393 (2004), this Court acknowledged the right of the City of Henderson to impose conditions on a conditional use permit; however, the conditions imposed were not at issue in that case as the appellants were city residents who opposed the issuance of the permit altogether. Moreover, we must focus on the exact language of the ordinances before us in the case *sub judice*.

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port its determination to *deny* the permit on that basis. Once this basis for denial is established, then the Board moves on to Section 15-59(a) and may apply conditions. It is not coincidental that the same enumerated factors listed in 15-54(c)(4) are the same factors that serve as a basis for conditions in 15-59(a).

The majority now seeks to remand this case to the Board so it may incorporate findings that were not made and, as discussed *infra*, would not be supported by competent evidence. I cannot concur with that result.

## B. The Board's Violation of These Ordinances

In reviewing the record, the Board did not make the necessary findings in order to apply conditions to the permit.<sup>7</sup> Unlike the majority, I believe that the lack of findings coupled with the Board's clear proclamation that all aspects of the ordinance had been complied with served to prohibit the addition of the contested conditions.

As Northwest notes in its appellate brief, the Board found that the application was complete and that it complied with the Land Use Ordinance. At that point, the permit should have been issued as proposed. In other words, if the proposed permit did not violate any of the enumerated factors in Section 15-54(c), or any other aspect of the Land Use Ordinance, then the permit should have been issued without the conditions in dispute. Section 15-54(c). Nevertheless, the Board proceeded to approve the permit with conditions, without making appropriate findings with regard to Section 15-54(c)(4). If, in fact, condition fifteen was imposed because the ingress/egress on Barnes Street would "materially endanger the public health or safety" under 15-54(c)(4), the Board was required to make findings to that effect "based upon the evidence submitted." Section 15-58(3). "A court will normally defer to a board of adjustment so long as a condition is reasonably related to the proposed use, does not conflict with the zoning ordinance, and furthers a legitimate objective of the zoning ordinance." *Overton*, 155 N.C. App. at 104, 574 S.E.2d at 153.

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7. "After taking evidence, the board must make written findings of fact. This is necessary to let the parties-and, if the matter is appealed, the courts-know what the board concluded about the facts of the case. A simple written conclusion that the standards were or were not met is not sufficient, nor is a letter just stating the permit has been issued or denied. The findings need to provide enough detail to let the reader know what the board determined the key facts to be. Proposed factual findings can be drafted ahead of time (by the applicant, the opponents, or the staff) and adopted at the meeting, or findings can be composed at the conclusion of the hearing. . . . The board must also provide a written decision applying these facts to the standards of the ordinance." *Owens*, *supra*, at 56-57.

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Here, condition fifteen conflicts with the directives of the zoning ordinance as the appropriate findings were not made.

“[I]n passing upon an application for a special permit, a board of aldermen may not violate at will the regulations it has established for its own procedure; it must comply with the provision of the applicable ordinance.” *Humble Oil*, 284 N.C. at 467, 202 S.E.2d at 135. The Board in this case failed to comply with the requirements of the ordinances when it found that the permit application was complete and in compliance with the Land Use Ordinance, but then proceeded to attach conditions two and fifteen to the permit. The trial court erred in not identifying the Board’s non-compliance with the Town’s ordinances. Because the permit was in compliance with the Land Use Ordinance, as determined by the Board, the conditions imposed were not justified, and thus the trial court should have struck conditions two and fifteen as requested by Northwest.<sup>8</sup> Accordingly, this Court should reverse the trial court’s Order as the court did not “[i]nsur[e] that procedures specified by law in both statute and ordinance [were] followed.” *Coastal Ready-Mix Concrete Co.*, 299 N.C. at 626, 265 S.E.2d at 383.<sup>9</sup>

After carefully reviewing the majority’s interpretation of the ordinances, I acknowledge that the process of Board approval outlined by the majority would be a legally sound and efficient manner of approv-

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8. The validity of condition fifteen is the crux of this case and we focus primarily on it. However, in order to strike condition fifteen without invalidating the permit as a whole, condition two must also be stricken from the permit.

9. Though not dispositive, it is pertinent to note that at the close of the second hearing in this matter, Carrboro Mayor Mark Chilton stated: “Well . . . the concern I have about some of the comments I’ve heard from the board tonight is that . . . basically this project is . . . it’s a commercial project—commercial retail project that’s proposed . . . in a zoning district that allows that type of commercial retail project. And—it’s fundamentally about the size of development that the development ordinance contemplates for the site. . . . And I am inclined to think that there are a number of important conditions that need to be applied to before I would be comfortable with issuing a permit for this project. But, basically, fundamentally, I don’t really see a reason—a legally valid reason why the project would be rejected altogether. . . . I would like to hear a motion to move out of the public hearing because I think we’re—we need to get to that point where we consider the application in detail and look at . . . what kind of conditions might be acceptable to the board and acceptable to the applicant because there’s really not a reason to[,] . . . that I can see to say no to this altogether.”

The mayor’s statements mirror the townspeople’s unease with the development and their desire to impose conditions; however, there must be a legally valid reason for first denying the permit altogether and then applying conditions. As the Mayor suggests, he did not see a reason for denying the permit at that time and, in fact, no findings were ever made that would justify denying the permit.

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ing a conditional use permit with reasonable conditions attached; however, the ordinances as written do not support the majority's interpretation. The Town is not prohibited from modifying the ordinances to set up a process by which it can attach reasonable conditions without first finding grounds to deny the permit.

III. Lack of Competent, Material and Substantial Evidence  
in the Whole Record

Before addressing the disposition of this case in further detail *infra*, I first address several of Northwest's remaining arguments which are not addressed by the majority. My determination on these issues further supports my position that there are no matters left to be resolved by the Board on remand.

Northwest argues that the trial court erred in concluding as a matter of law that there was competent, material, and substantial evidence in the whole record supporting the Board's imposition of condition fifteen. I agree. Therefore, assuming *arguendo* that the Board had made the appropriate findings, that the permit as proposed would materially endanger the public health or safety pursuant to Section 15-54(c)(4), I would still find that condition fifteen was not justified as the evidence presented at the hearing would not support such a finding.

Determining whether the decision of a town board was supported by competent, material and substantial evidence requires a whole record review. *Coastal Ready-Mix Concrete Co.*, 299 N.C. at 626, 265 S.E.2d at 383. In reviewing the trial court's findings of fact, I conclude that "the trial court made its determination 'based upon the record evidence.' Accordingly, [I] conclude that the trial court exercised the proper scope of review. Next . . . [it must be determined] whether the trial court exercised that scope of review correctly." *Howard v. City of Kinston*, 148 N.C. App. 238, 241, 558 S.E.2d 221, 225 (2002).

The general rule with regard to the burden of providing competent, material, and substantial evidence is as follows:

When an applicant has produced competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of a special use permit, *prima facie* he is entitled to it. A denial of the permit should be based upon findings *contra* which are supported by competent, material, and substantial evidence appearing in the record.

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*Humble Oil*, 284 N.C. at 468, 202 S.E.2d at 136. “ ‘Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. It must do more than create the suspicion of the existence of the fact to be established . . . .’ ” *Weaverville Partners, LLC v. Town of Weaverville Zoning Bd. of Adjust.*, 188 N.C. App. 55, 61, 654 S.E.2d 784, 789 (2008) (quoting *Humble Oil*, 284 N.C. at 470-71, 202 S.E.2d at 137).

The Town ordinance in this case, which is in accord with the general rule, is clear on the burden of persuasion. Section 15-55 states in pertinent part:

(b) Once a complete application has been submitted, the burden of presenting evidence to the permit-issuing board sufficient to lead it to conclude that the application should be denied for any reasons stated in Subdivisions 15-54(c)(1), (3), or (4) shall be upon the party or parties urging this position, unless the information presented by the applicant in his application and at the public hearing is sufficient to justify a reasonable conclusion that a reason exists for denying the application as provided in Subdivision 15-54(c)(1), (3), or (4).

(a) The burden of persuasion on the issue of whether the development, if completed as proposed, will comply with the requirements of this chapter remains at all times on the applicant. The burden of persuasion on the issue of whether the application should be turned down for any reason set forth in Subdivision 15-54(c)(4) rests on the party or parties urging that the requested permit should be denied.

Thus, Northwest bore the burden of submitting an application that complied with the Land Use Ordinance, and upon doing so was *prima facie* entitled to approval. *Id.* Those in opposition to the permit as proposed, i.e. the community members who questioned the safety of the Barnes Street entrance/exit, then had the burden of providing competent, material, and substantial evidence that Northwest's application violated 15-54(c)(4). *Id.*; *Howard*, 148 N.C. App. at 246, 558 S.E.2d at 227 (“[T]he burden of establishing that the approval of a conditional use permit would endanger the public health, safety, and welfare falls upon those who oppose issuance of the permit.”). The Board was then obligated to make findings with regard to the violation of Section 15-54(c)(4), and could then impose reasonable conditions to bring the permit back into compliance so it

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could be granted. Section 15-58; Section 15-59. As noted *supra*, the Board did not make any findings with regard to 15-54(c)(4), and in fact stated that the permit as proposed complied with all requirements of the Land Use Ordinance. Nevertheless, the trial court, in reviewing the whole record, concluded that there was competent, material, and substantial evidence to support the Board's imposition of condition fifteen.

In the case *sub judice*, the community members in their petition demanded that there be “[n]o vehicular access to the Shoppes at Jones Ferry from Barnes St.” The record shows that neither the Planning Board nor any of the advisory boards recommended that the Barnes Street access point be limited to emergency vehicles only, as condition fifteen ultimately dictated. There is no dispute that Northwest's own “Traffic Impact Analysis” (“TIA”) showed an increase in traffic around the property, but the report concluded that the estimated increase in traffic did not meet North Carolina Department of Transportation (“NCDOT”) warrants for a traffic signal or roundabout, that ten accidents had occurred at the intersection in question in the past five years, and “[t]he traffic analysis indicates that the intersection will operate at an acceptable level of service during both the A.M. and P.M. peak hours.” More specifically, the TIA stated that the Barnes Street access point would operate at “Level of Service ‘A’” in the A.M. and P.M. peak hours after development. Level of Service A is described as “little or no delay” caused by traffic volume.

At the hearing, Northwest called Lyle Overcash (“Overcash”), a qualified traffic engineer, to testify regarding the TIA. Overcash testified that the intersection was “pretty far away” from DOT's standards for installing a traffic signal primarily because there had been so few accidents, on average, over the last five years.

Due to safety concerns, Northwest agreed to move the access point on Barnes Street closer to Jones Ferry Road and to prohibit delivery, service, and trash pick-up vehicles from utilizing that entrance/exit. Furthermore, Northwest agreed to install a traffic light at the intersection if NCDOT would approve it.

At the hearings, community citizens testified regarding their concerns that additional traffic could lead to “traffic problems” in the neighborhood. Several individuals testified that they personally had been involved in accidents at the Jones Ferry Road/Barnes Street

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intersection. However, “[a]n increase in traffic does not necessarily mean an intensification of traffic congestion or a traffic hazard.” *Humble Oil*, 284 N.C. at 469, 202 S.E.2d at 136. Furthermore, “none of the residents provided any mathematical studies or factual basis for their opinions regarding how the increased traffic generated from the project would significantly impact the surrounding neighborhood. Rather, all of the residents’ testimony consisted of speculative opinions.” *Weaverville Partners*, 188 N.C. App. at 64, 654 S.E.2d at 791. The trial court noted in its findings of fact that “[n]o scientific data, surveys, reports or other statistical or empirical data was presented in support of the neighbors’ personal observations or involvement.”

A city council may not deny a conditional use permit in their unguided discretion or because, in their view, it would adversely affect the public interest. Moreover, a city council’s denial of a conditional use permit based solely upon the generalized objections and concerns of neighboring community members is impermissible. Speculative assertions, mere expression of opinion, and generalized fears about the possible effects of granting a permit are insufficient to support the findings of a quasi-judicial body. In other words, the denial of a conditional use permit may not be based on conclusions which are speculative, sentimental, personal, vague, or merely an excuse to prohibit the requested use.

*Howard*, 148 N.C. App. at 246, 558 S.E.2d at 227 (quotation marks and internal citations omitted). Accordingly, based on the whole record, there was not competent, material, and substantial evidence to support the imposition of condition fifteen in this case. The trial court consequently erred in its conclusion of law to the contrary.

## IV. Arbitrary and Capricious

Northwest further argues that the imposition of conditions two and fifteen were arbitrary and capricious. Again, a whole record review is required. *Coastal Ready-Mix Concrete Co.*, 299 N.C. at 626, 265 S.E.2d at 383. “ ‘When a Board action is unsupported by competent substantial evidence, such action must be set aside for it is arbitrary.’ ” *Weaverville Partners*, 188 N.C. App. at 67, 654 S.E.2d at 793 (quoting *MCC Outdoor, LLC v. Town of Franklinton Bd. of Comm’rs*, 169 N.C. App. 809, 811, 610 S.E.2d 794, 796 (2005)). Thus, the Board’s actions in this case were arbitrary and capricious as they were not supported by material, competent, and substantial evidence in the

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record. The trial court erred in determining that the imposition of conditions two and fifteen were not arbitrary and capricious.<sup>10</sup>

## V. Disposition of the Permit

It has been established in this State, that “a court may not properly modify a permit issued by a board of adjustment or board of commissioners unless there are no administrative decisions remaining or it is clear that the same result would occur on remand.” *Overton*, 155 N.C. App. at 109, 574 S.E.2d at 156. It is my position that there are no administrative decisions remaining in this case that would be properly before the Board on remand. The Board found that the permit complied with all requirements of the Land Use Ordinance and failed to establish any findings contra based on competent, material, and substantial evidence. Furthermore, assuming the Board had found that the increase in traffic presented a material danger to public safety, there was not competent, material, and substantial evidence to support such a finding. Accordingly, there are no additional findings to be made by the Board. Because the Board should have granted the permit without the challenged conditions, the trial court erred in failing to strike conditions two and fifteen as requested by Northwest. Accordingly, I would reverse the trial court’s order and remand with instruction to strike conditions two and fifteen.

Condition fifteen is the primary focus of this appeal; nevertheless, I would also order the trial court to strike condition two because it states that the entire permit will be deemed invalid if any of the other conditions attached to the permit are found to be invalid. I recognize that in *Overton* a “boilerplate” condition similar to condition two in this case was present in the issued permit; however, it appears that the boilerplate condition was not disputed by the appellant in *Overton*. *Id.* at 107-08, 574 S.E.2d at 155-56. Nonetheless, this Court held that the trial court was able to strike the two disputed conditions and require the county board of commissioners to reissue the permit. *Id.* *Overton* suggests that condition fifteen alone can be struck without invalidating the permit; however, here, unlike in *Overton*, appellant Northwest has specifically assigned error to the imposition of condition two, and because the Board found that Northwest complied with all aspects of the Land Use Ordinance, the imposition of both conditions two and fifteen were not justified.

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10. *Overton*, 155 N.C. App. at 104, 574 S.E.2d at 153-54, sets out the test for determining whether a condition is reasonable, including whether the condition “unreasonably affects the way in which business on the property can be conducted.” However, there is no need to address whether condition fifteen was “reasonable” since the condition should not have been attached at all.

**McCRACKEN & AMICK, INC. v. PERDUE**

[201 N.C. App. 480 (2009)]

Conclusion

In analyzing the relevant ordinances in this case, I would hold that the Board was required to issue Northwest's requested permit as proposed, absent conditions two and fifteen, because the permit complied with all of the requirements of the Land Use Ordinance. Absent findings that the permit violated one of the provisions of 15-54(c), the Board could not impose conditions, which are meant to bring the permit back into compliance. Furthermore, in reviewing the whole record, there was not competent, material, and substantial evidence to support a finding that the permit, as proposed, would materially endanger the public health or safety. Therefore, the condition was also arbitrary and capricious.

Based on the foregoing, I believe the correct course of action is to reverse the trial court's decision and remand with instruction for the trial court to strike conditions two and fifteen and order the Town to reissue the permit without these conditions.

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MCCRACKEN AND AMICK, INCORPORATED D/B/A THE NEW VEMCO MUSIC CO. AND  
RALPH AMICK, PLAINTIFFS V. BEVERLY EAVES PERDUE, IN HER OFFICIAL CAPACITY  
AS GOVERNOR OF NORTH CAROLINA, DEFENDANT

No. COA09-431

(Filed 22 December 2009)

**Indians— federal Indian gaming law—preferential gaming rights**

The trial court erred in a declaratory judgment action by granting judgment in favor of plaintiffs on their claim that the State is not permitted under federal Indian gaming law to grant the Eastern Band of Cherokee Indians of North Carolina exclusive rights to conduct certain gaming on tribal land while prohibiting it throughout the rest of the State. N.C.G.S. § 71A-8 reflects a policy decision by the General Assembly to extend preferential gaming rights in deference to a separate sovereign entity residing within its borders.

Appeal by defendant from order entered 19 February 2009 by Judge Howard E. Manning, Jr. in Wake County Superior Court. Heard in the Court of Appeals 14 October 2009.

## McCRACKEN &amp; AMICK, INC. v. PERDUE

[201 N.C. App. 480 (2009)]

*Everett Gaskins Hancock & Stevens, LLP, by Hugh Stevens, Michael J. Tadych, and James M. Hash, for plaintiffs-appellees.*

*Attorney General Roy Cooper, by Special Deputy Attorney General Mark A. Davis, for defendant-appellant.*

*Eastern Band of Cherokee Indians, by Attorney General Annette Tarnawsky; Ben Oshel Bridgers, PLLC, by Ben Oshel Bridgers; and Holland & Knight LLP, by Frank Lawrence, Los Angeles, California, pro hac vice, for amici curiae Eastern Band of Cherokee Indians, National Congress of American Indians, National Indian Gaming Association, United South and Eastern Tribes, Arizona Indian Gaming Association, and Poarch Band of Creek Indians of Alabama.*

HUNTER, Robert C., Judge.

The State appeals from the trial court's order entering judgment in favor of plaintiffs McCracken and Amick, Incorporated, doing business as The New Vemco Music Co., and its principal owner, Ralph Amick, on their claim that the State is not permitted under federal Indian gaming law to grant the Eastern Band of Cherokee Indians of North Carolina ("the Tribe") exclusive rights to conduct certain gaming on tribal land while prohibiting it throughout the rest of the State. We conclude, however, that state law providing the Tribe with exclusive gaming rights does not violate federal Indian gaming law. Consequently, we reverse the trial court's order.

### Facts and Procedural History

In 1988, Congress enacted the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 through 2721 ("IGRA"), in order "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments[.]"<sup>1</sup> 25 U.S.C. § 2702(1). IGRA creates three classes of gaming: Class I gaming is defined as "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations." 25 U.S.C. § 2703(6). Class II gaming includes bingo and card games (other than banking card games) operated in accordance with state law regarding the amount of wagers

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1. IGRA was enacted in response to *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 94 L. Ed. 2d 244 (1987), where the United States Supreme Court held that states could not enforce state laws *regulating* gaming against Indian tribes—only criminal statutes *prohibiting* gaming could be enforced under federal law.

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and hours of operation. 25 U.S.C. § 2703(7). Class III gaming encompasses “all forms of gaming that are not class I gaming or class II gaming,” including slot machines, casino-style games, banking card games, video games, and lotteries. 25 U.S.C. § 2703(8). With respect to Class III gaming, IGRA requires a compact between the federally recognized Indian tribe and the State prior to the tribe being permitted to conduct Class III gaming on its land.

In August 1994, the Tribe entered into a compact with the State of North Carolina that permits the Tribe to conduct “raffles,” “video games,” and “other Class III gaming which may be authorized” in writing by the Governor. Under the compact, the Tribe operates Harrah’s Cherokee Casino in Cherokee, North Carolina, which attracts more than 3.5 million visitors a year and generates annual revenues over \$250,000,000. In 2000, the terms of the compact were extended until 2030.

Prior to 1 July 2007, video poker was legal in North Carolina but heavily regulated. In 2006, the General Assembly enacted Senate Bill 912, which became Chapter 6 of the 2006 Session Laws (“S.L. 2006-6”).<sup>2</sup> S.L. 2006-6 phased out the number of video poker machines permitted in the State and banned them completely as of 1 July 2007. S.L. 2006-6 repealed N.C. Gen. Stat. § 14-306.1 (2005), which legalized and regulated video poker, and enacted N.C. Gen. Stat. § 14-306.1A (2007), which, effective 1 July 2007, made it “unlawful for any person to operate, allow to be operated, place into operation, or keep in that person’s possession for the purpose of operation any video gaming machine,” including video poker machines. N.C. Gen. Stat. § 14-306.1A(a). Although N.C. Gen. Stat. § 14-306.1A criminalizes video poker in general in North Carolina, the legislature carved out an exception from the ban for “a federally recognized Indian tribe,” making it lawful for a tribe to possess and operate video poker machines on tribal land “if conducted in accordance with an approved Class III Tribal-State Compact applicable to that tribe . . .” N.C. Gen. Stat. § 14-306.1A(a). S.L. 2006-6 also contains a voiding clause, providing that “[i]f a final Order by a court of competent jurisdiction prohibits possession or operation of video gaming machines by a federally recognized Indian tribe because that activity is not allowed elsewhere in this State, this act is void.”

Plaintiffs own and operate video games, vending machines, and amusement devices, such as juke boxes, pinball machines, and pool

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2. Act of June 6, 2006, ch. 6, sec. 4, 2006 N.C. Sess. Laws 6-6.

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tables. Prior to 1 July 2007, plaintiffs' business also included selling, leasing, distributing, operating, and maintaining video poker machines. On 10 November 2008, plaintiffs filed a declaratory judgment action against the State, alleging that the State is not permitted under IGRA to grant the Tribe a gaming "monopoly" withing the State. Plaintiffs also asserted a "separation of powers" violation in that "the authority to negotiate, approve and execute tribal-state compacts or amendments to the existing Compact is reserved to the General Assembly"—not the Governor.

On 21 November 2008, the State moved to dismiss plaintiffs' complaint on multiple grounds, including: (1) lack of standing; (2) failure to state a claim for relief; and (3) failure to join a necessary party—the Tribe—to the action. On 18 February 2009, plaintiffs took a voluntary dismissal of their separation of powers claim. With the consent of the parties, the trial court converted the State's motion to dismiss into a motion for judgment on the pleadings with respect to plaintiff's IGRA claim.

The trial court entered an order on 19 February 2009, concluding that "IGRA does not permit a state to ban the possession and operation of video gaming machines elsewhere in the state while allowing their possession and operation on tribal lands." Thus, the trial court "declare[d] that the State acted unlawfully in authorizing the Eastern Band of the Cherokee Indians to possess and operate video gaming machines on tribal lands within North Carolina because that activity is not allowed elsewhere in this State; pursuant to Section 12 of SL 2006-6, this declaration renders G.S. § 14-306.1A null, void and of no effect." Consequently, the trial court entered judgment on the pleadings in favor of plaintiffs. The State noticed appeal from the trial court's order and the trial court stayed "the operation and effect of [its] rulings . . . pending the resolution of the State's appeal."

### Standard of Review

The State contends that the trial court erred in entering judgment on the pleadings in favor of plaintiffs.<sup>3</sup> On appeal, the trial court's

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3. *Amici curiae* argue that the Tribe is a necessary party to this action and thus the trial court erred in not joining the Tribe prior to entering judgment. Although the State moved to dismiss on this basis, the trial court did not rule on this issue, the State did not assign error to the court's failure to address the issue, and the State presents no argument on appeal that the Tribe is an unjoined necessary party. As the issue is raised only in the *amici curiae's* brief, we decline to address the issue in the absence of exceptional circumstances. See *Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 719 n.10 (9th Cir. 2003) [hereinafter *Artichoke Joe's II*] (declining to

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grant of a motion for judgment on the pleadings pursuant to N.C.R. Civ. P. 12(c) is reviewed de novo. *Toomer v. Branch Banking & Tr. Co.*, 171 N.C. App. 58, 66, 614 S.E.2d 328, 335, *disc. review denied*, 360 N.C. 78, 623 S.E.2d 263 (2005). Judgment on the pleadings is proper “when all the material allegations of fact are admitted in the pleadings and only questions of law remain.” *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974).

Validity of S.L. 2006-6

As the trial court correctly points out, this case “arises out of the interplay” between IGRA, the tribal-state compact between the Tribe and the State of North Carolina, and the State’s criminalization of video gaming machines pursuant to S.L. 2006-6. IGRA “divides gaming on Indian lands into three classes—I, II, and III—and provides a different regulatory scheme for each class.” *Seminole Tribe v. Florida*, 517 U.S. 44, 48, 134 L. Ed. 2d 252, 262 (1996). IGRA dictates that Class III gaming, the category at issue here, is “lawful on Indian lands only if such activities are”: (1) authorized by an approved tribal ordinance or resolution; (2) “located in a State that permits such gaming for any purpose by any person, organization, or entity”; and (3) conducted in conformance with a tribal-state compact in effect. 25 U.S.C. § 2710(d)(1)(A)-(C); *Seminole Tribe*, 517 U.S. at 48-49, 134 L. Ed. 2d at 261-62.

Through Chapter 71A of the General Statutes, the chapter dealing with “Indians,” the General Assembly permits gaming by federally recognized tribes on tribal lands provided that the gaming is authorized by a tribal-state compact:

In recognition of the governmental relationship between the State, federally recognized Indian tribes and the United States, a federally recognized Indian tribe may conduct games consistent with the Indian Gaming Regulatory Act, Public Law 100-497, that are in accordance with a valid Tribal-State compact executed by the Governor pursuant to G.S. 147-12(14) and approved by the U.S. Department of Interior under the Indian Gaming Regulatory Act, and such games shall not be unlawful or against the public policy of the State if the State permits such gaming for any purpose by any person, organization, or entity.

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address whether tribe was necessary party to challenge to the validity of tribal-state gaming compacts because the issue was “raised only in an amicus brief”), *cert. denied*, 543 U.S. 815, 51, 160 L. Ed. 2d 20 (2004).

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N.C. Gen. Stat. § 71A-8 (2007). The Fourth Circuit has recognized that “North Carolina, citing the IGRA and acknowledging that the Eastern Band of Cherokee Indians is a federally recognized Indian tribe, . . . authorized, subject to various regulations, Class III gaming, the operation of video gaming devices, and the administering of raffles.” *United States v. Garrett*, 122 Fed. Appx. 628, 630 (4th Cir. 2005).

In 2006, the General Assembly enacted S.L. 2006-6, codified as N.C. Gen. Stat. § 14-306.1A, which provides in pertinent part:

(a) Ban on Machines.—It shall be unlawful for any person to operate, allow to be operated, place into operation, or keep in that person’s possession for the purpose of operation any video gaming machine as defined in subsection (b) of this section, except for the exemption for a federally recognized Indian tribe under subsection (e) of this section for whom it shall be lawful to operate and possess machines as listed in subsection (b) of this section if conducted in accordance with an approved Class III Tribal-State Compact applicable to that tribe, as provided in G.S. 147-12(14) and G.S. 71A-8.

. . . .

(e) Exemption for Activities Under IGRA.—Notwithstanding any other prohibitions in State law, the form of Class III gaming otherwise prohibited by subsections (a) through (d) of this section may be legally conducted on Indian lands which are held in trust by the United States government for and on behalf of federally recognized Indian tribes if conducted in accordance with an approved Class III Tribal-State Gaming Compact applicable to that tribe as provided in G.S. 147-12(14) and G.S. 71A-8.

N.C. Gen. Stat. § 14-306.1A(a), (e).

Determining whether S.L. 2006-6 and the Tribal-State compact violate IGRA requires interpretation of 25 U.S.C. § 2710(d)(1)(B), the provision regulating Class III gaming on Indian lands. Questions of statutory interpretation are questions of law, reviewed de novo on appeal. *Hudson v. Hudson*, 299 N.C. 465, 472, 263 S.E.2d 719, 724 (1980). The primary objective of statutory interpretation is to ascertain and effectuate the intent of the legislature. *Burgess v. Your House of Raleigh*, 326 N.C. 205, 209, 388 S.E.2d 134, 137 (1990). To this end, the court must first determine whether the statutory language is clear and unambiguous, and if so, it “will apply the plain meaning of the words, with no need to resort to judicial construc-

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tion.” *Wiggs v. Edgecombe Cty.*, 361 N.C. 318, 322, 643 S.E.2d 904, 907 (2007). Judicial construction is necessary to ascertain legislative intent only where the statutory language is ambiguous. *Burgess*, 326 N.C. at 209, 388 S.E.2d at 137.

The parties’ disagreement focuses on the proper meaning of 25 U.S.C. § 2710(d)(1)(B), which provides that “Class III gaming activities shall be lawful on Indian lands only if such activities are . . . (B) located in a State that permits such gaming for any purpose by any person, organization, or entity[.]” This provision raises two separate but related issues of interpretation: (1) whether S.L. 2006-6, which authorizes Class III gaming only by tribes and only on tribal land, satisfies § 2710(d)(1)(B)’s prerequisite that North Carolina be a state that “permits such gaming”; and (2) whether the scope of the language “any person, organization, or entity” includes Indian tribes.

“Permits Such Gaming”

With respect to IGRA’s “permits such gaming” provision, plaintiffs maintain that a state that, with the exception of tribal gaming, prohibits Class III gaming statewide does not, as a matter of public policy, “permit such gaming.” Plaintiffs contend that S.L. 2006-6 cannot be reconciled with 25 U.S.C. 2701(5), which provides that “Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is *conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.*” (Emphasis added.) Plaintiffs maintain that the public policy of the State, as expressed by the General Assembly in S.L. 2006-6, is generally to prohibit Class III gaming notwithstanding the exception provided for federally recognized tribes. Thus, plaintiffs argue, because the overarching public policy of the State is to prohibit Class III gaming, the State does not “permit such gaming” under § 2710(d)(1)(B).

The State counters that the “plain language” of the statute “allows a State to ban video gaming statewide but to carve out an exception for gaming occurring on tribal land pursuant to a Tribal/State compact.” The State argues that N.C. Gen. Stat. § 71A-8 and N.C. Gen. Stat. § 14-306.1A(e) clearly “articulat[e]” the public policy of North Carolina: “These laws reflect a policy decision by the General Assembly to extend preferential gaming rights in deference to a separate sovereign entity residing within its borders.” Thus, the State claims, North Carolina “permits” Class III gaming as required by IGRA.

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“The legislative branch of government is without question ‘the policy-making agency of our government . . . .’” *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 169, 594 S.E.2d 1, 8 (2004) (quoting *McMichael v. Proctor*, 243 N.C. 479, 483, 91 S.E.2d 231, 234 (1956)). “[W]here the law-making power speaks on a particular subject over which it has power to legislate, public policy in such cases is what the law enacts.” *Cauble v. Trexler*, 227 N.C. 307, 311, 42 S.E.2d 77, 80 (1947). Here, the General Assembly has expressed the public policy of the State through N.C. Gen. Stat. § 71A-8, which explicitly authorizes Indian gaming in accordance with IGRA, and N.C. Gen. Stat. § 14-306.1A, which criminalizes Class III gaming in North Carolina except for the Tribe’s enterprises. See *Hatcher v. Harrah’s N.C. Casino Co., LLC*, 169 N.C. App. 151, 156, 610 S.E.2d 210, 213 (2005) (holding that “trial court erred by concluding that North Carolina public policy is violated by the video poker machine operated by the Eastern Band of Cherokee Indians”). S.L. 2006-6’s voiding clause, moreover, manifests the Legislature’s intent that the Tribe should retain its Class III gaming rights under the tribal-state compact no matter what the outcome is of a challenge to S.L. 2006-6’s legality—if upheld, the Tribe’s Class III gaming is exempted from the statewide prohibition; if struck down, the statewide ban is invalidated.

This conclusion is bolstered by the reasoning of the district court in *Artichoke Joe’s v. Norton*, 216 F. Supp. 2d 1084 (E.D. Cal. 2002) [hereinafter *Artichoke Joe’s I*], *aff’d*, 353 F.3d 712 (2003), *cert. denied*, 543 U.S. 815, 160 L. Ed. 2d 20 (2004). In interpreting IGRA’s “permits such gaming” requirement, the district court observed that Congress had “employed capacious language to clarify the situations in which it would be lawful for Indian tribes to offer class III gaming”:

The Act does not define “permits”; neither placing restrictions on the word nor otherwise limiting its meaning. Section 2710(d)(1)(B) does not say “permits such gaming independently of IGRA for any purpose by any person, organization, or entity.” It does not say “permits such gaming for any purpose by any person, organization, or entity other than Indian tribes.” And it is precisely because Congress did not write the Act in either of these ways that [a state], subject to the Secretary[ of the Interior]’s approval, may “permit” class III gaming within the structure of IGRA, even though the permission is not entirely independent of IGRA, and even though IGRA prevents states from unilaterally legalizing tribal gaming. In short, the statute is written broadly, and it is consistent with the co-operative

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federalism at the heart of IGRA to allow the state to “permit” tribal gaming under the Act by exempting the tribes from state prohibitions on [Class III gaming].

*Id.* at 1121.<sup>4</sup>

IGRA’s legislative history also supports the State’s position that IGRA permits states to grant tribes preferential gaming rights. *See Lilly v. N.C. Dept. of Human Resources*, 105 N.C. App. 408, 411-12, 413 S.E.2d 316, 318 (1992) (holding that legislative history of federal statute supported plain meaning of statutory language). When Congress was considering the Supreme Court’s decision in *Cabazon*, two different bills were introduced: Senate Bill 555 and Senate Bill 1303. The majority of Senate Bill 555 was adopted and ultimately enacted by Congress as IGRA. The initial draft of Senate Bill 555, however, included § 11(d)(1) and (2), which provided in pertinent part:

(1) Except as provided in paragraph (2) of this subsection, class III gaming shall be unlawful on any Indian lands under section 1166 of title 18, United States Code.

(2)(A) *A gaming activity on Indian lands that is otherwise legal within the State where such lands are located* may be exempt from the operation of paragraph (1) of this subsection where the Indian tribe requests the Secretary to consent to the transfer of all civil and criminal jurisdiction, except for taxing authority, pertaining to the licensing and regulation of gaming over the proposed gaming enterprise to the State within which such gaming enterprise is to be located and the Secretary so consents.

133 Cong. Rec. 3740 (1987) (emphasis added). This language was taken out of the bill and the current, broader language was substituted from Senate Bill 1303. 133 Cong. Rec. 14332, § 10(b). Senate Bill 555’s original language—“otherwise legal within the State”—supports plaintiffs’ contention that persons, organizations, or entities other than the Tribe must be allowed to engage in Class III gaming activities in order for the State to permit the Tribe to conduct such gaming activities. As one federal appellate court observed, however: “The fact that the ‘permits such gaming’ text was taken from another bill

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4. Although not binding on North Carolina’s courts, the holdings and underlying rationale of lower federal courts may be considered persuasive authority in interpreting a federal statute. *Security Mills v. Trust Co.*, 281 N.C. 525, 529, 189 S.E.2d 266, 269 (1972).

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suggests that the substitution was deliberate, and the particular substitution that the drafters chose implies that Congress intended a broader meaning than the one proposed by Plaintiffs.” *Artichoke Joe’s II*, 353 F.3d at 727. “Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.” *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43, 94 L. Ed. 2d 434, 455 (1987) (citation and internal quotation marks omitted). Based on the plain language of the statute, supported by its legislative history, we conclude that North Carolina satisfies § 2710(d)(1)(B)’s “permits such gaming” requirement.

“Any Person, Organization, or Entity”

The parties similarly disagree about the meaning of IGRA’s phrase “any person, organization, or entity.” The State argues that because tribal gaming enterprises are not explicitly excluded from the phrase “any person, organization, or entity,” IGRA enables the State to grant the Tribe exclusive Class III gaming rights. Plaintiffs, on the other hand, contend that it stands § 2710(d)(1)(B) “on its head” to read the phrase “any person, organization, or entity” as “includ[ing] the very tribe whose authority is at issue.” Thus, plaintiffs argue, § 2710(d)(1)(B) must be read as requiring states to permit Class III gaming for any purpose by any *non-Indian* person, organization, or entity, if it permits it for the Tribe.

The focal point of the parties’ arguments is the word “any.” Under the State’s reading of § 2710(d)(1)(B), “any” means “one”—the State may grant the Tribe exclusive Class III gaming rights under IGRA if state law permits Class III gaming for at least *one* purpose for at least *one* person, organization, or entity, including the Tribe itself. The State’s interpretation of § 2710(d)(1)(B) is both reasonable and supported by the decisions of other courts of other jurisdictions that have addressed this issue. *See Artichoke Joe’s I*, 216 F. Supp. 2d at 1122 (“The word ‘any’ can mean ‘every’ or ‘one.’ However, interpreting ‘any’ in § 2710(d)(1)(B) to mean ‘every’ must be rejected. . . . [Section] 2710(d)(1)(B) is best understood as allowing class III gaming compacts in states that permit that kind of gaming for at least one purpose, by at least one person, organization, or entity.”); *American Greyhound Racing, Inc. v. Hull*, 146 F. Supp. 2d 1012, 1067 (D. Ariz. 2001) (“The State must first legalize a game, even if only for tribes, before it can become a compact term.”), *vacated on procedural grounds*, 305 F.3d 1015 (9th Cir. 2002); *Dalton v. Pataki*, 5 N.Y.3d 243, 261, 835 N.E.2d 1180, 1190, 802 N.Y.S.2d 72, 82 (N.Y.) (con-

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cluding that “if class III gaming is permitted in the state for any purpose, . . . it will be permitted on Indian land”), *cert. denied*, 546 U.S. 1032, 163 L. Ed. 2d 571 (2005).

According to plaintiffs’ interpretation, however, “any” means “every”—in order for the State to grant the Tribe Class III gaming rights, state law must also allow every other person, organization, or entity within the State to conduct Class III gaming, albeit subject to regulation. This interpretation is likewise not unreasonable. *See Artichoke Joe’s II*, 353 F.3d at 724 (holding that “[a]lthough the trend of judicial construction of § 2710(d)(1)(B) slightly favors” reading “any” as “one,” interpreting “any” as “every” not unreasonable). We, therefore, conclude—as have all other appellate decisions we have found addressing this issue—that the phrase “any person, organization or entity” is ambiguous. *See id.* at 723 (“There is nothing in the text itself that definitively resolves whether Congress intended Indian tribes to fall within the scope of ‘any person, organization, or entity’ under this provision.”); *Artichoke Joe’s I*, 216 F. Supp. 2d at 1123 (considering legislative history of IGRA “to the extent that the language of § 2710(d)(1)(B) might be ambiguous”); *Flynt v. California Gambling Control Com.*, 104 Cal. App. 4th 1125, 1138, 129 Cal. Rptr. 2d 167, 178 (Cal. Ct. App. 2002) (“We find the text of section 2710(d)(1)(B) ambiguous.”), *cert. denied*, 540 U.S. 948, 157 L. Ed. 2d 278 (2003).

When a statute is ambiguous, principles of statutory construction are necessary to discern legislative intent. *Young v. Whitehall Co.*, 229 N.C. 360, 367, 49 S.E.2d 797, 801 (1948). The best indicia of legislative intent are the purpose and spirit of the statute, the goal it sought to accomplish, its legislative history, and the circumstances surrounding its enactment. *Black v. Littlejohn*, 312 N.C. 626, 630, 325 S.E.2d 469, 473 (1985).

Congress provides that two of the primary purposes of IGRA are

(1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments; [and]

(2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players[.]

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25 U.S.C. § 2702(1)-(2). The stated purposes of IGRA “strongly suggest[] that the thrust of the [statute] is to promote Indian gaming, not to limit it.” *Grand Traverse Band v. Office of U.S. Atty.*, 369 F.3d 960, 971 (6th Cir. 2004). As recognized by other appellate courts, nowhere in Congress’ “[d]eclaration of policy” is there any indication that IGRA was intended to establish parity between Indian and non-Indian gaming enterprises. *See, e.g., Artichoke Joe’s II*, 353 F.3d at, 728 (“Nowhere is there any reference to the idea that IGRA serves as a means of policing equality between Indian and non-Indian gaming operations in the context of class III gaming.”); *Flynt*, 104 Cal. App. 4th at 1139, 129 Cal. Rptr. 2d at 178 (“Quite simply, Congress exhibited no desire to command states to enact gaming laws so that private non-Indian enterprises would enjoy the same rights as Indian tribes.”).

More pertinent to this case, in *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766, 85 L. Ed. 2d 753, 759 (1985), the United States Supreme Court held that “the standard principles of statutory construction do not have their usual force in cases involving Indian law.” One of the canons of construction that apply specially to Indian law, known as the *Blackfeet* presumption or trust doctrine, provides that federal statutes passed for the benefit of Indian tribes are to be liberally construed, with ambiguities being resolved in favor of the tribes. *Id.* at 767, 85 L. Ed. 2d at 760; *Three Affiliated Tribes v. Wold Engineering*, 467 U.S. 138, 150, 81 L. Ed. 2d 113, 123 (1984). In applying the *Blackfeet* presumption, any doubt as to the proper interpretation of a federal statute enacted for the benefit of an Indian tribe will be resolved in favor of the tribe as “[a]mbiguities in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence.” *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44, 65 L. Ed. 2d 665, 673 (1980).

Plaintiffs assert that the *Blackfeet* presumption “simply has no application here, because the legislative enactment at issue—Chapter 6 of the 2006 Session Laws—cannot be interpreted in any manner that is ‘unfavorable’ to the Tribe.” Plaintiffs misunderstand the subject of the presumption; it applies to federal Indian law, not state law. *See Arizona Public Service Co. v. E.P.A.*, 211 F.3d 1280, 1293 (D.C. Cir. 2000) (“[C]ourts construe federal statutes liberally to benefit Native American nations.” (Emphasis added.)).

It cannot be seriously disputed that IGRA—titled the *Indian Gaming Regulatory Act*—is a federal statute designed to benefit

Indian tribes. In its declaration of policy, Congress provides that one of the purposes of the gaming regulations in IGRA is to “promot[e] tribal economic development, self-sufficiency, and strong tribal governments[.]” 25 U.S.C. § 2702(1); *accord Artichoke Joe’s II*, 353 F.3d at 730 (“IGRA is undoubtedly a statute passed for the benefit of Indian tribes.”); *see also* Matthew L. M. Fletcher, *Bringing Balance to Indian Gaming*, 44 Harv. J. on Legis. 39, 51 (2007) (“Overall . . . Congress made clear that the purpose of [IGRA] was to benefit Indian tribes, not states, and to expand tribal opportunities for self-determination, self-government, economic development, and political stability.”). Thus, because § 2710(d)(1)(B)’s phrase “any person, organization or entity” is ambiguous as to whether the Tribe is included within its scope, the *Blackfeet* presumption applies.

Plaintiffs argue that there is no way to apply the *Blackfeet* presumption in this case because neither their interpretation of § 2710(d)(1)(B) nor the State’s is “more favorable to the Tribe than the other.” According to plaintiffs, if, as the trial court held, S.L. 2006-6 violates IGRA, then its voiding clause is triggered and the Tribe may continue to conduct its Class III gaming activities on tribal land. If, on the other hand, S.L. 2006-6 complies with IGRA’s requirements, then the Tribe retains its gaming rights under the tribal-state compact. Thus, according to plaintiffs, “the General Assembly has placed the Tribe in a ‘win-win’ position with respect to the outcome of this case.”

Plaintiffs’ characterization ignores the economic impact of invalidating S.L. 2006-6. The tribal-state compact between the Tribe and the State of North Carolina entitles the Tribe to conduct those Class III gaming activities specified in the compact. By prohibiting Class III gaming throughout the rest of the State, S.L. 2006-6 makes the Tribe’s gaming rights exclusive. If S.L. 2006-6 were invalidated, the Tribe would no longer have preferential gaming rights, but instead would be in competition with other gaming enterprises, such as plaintiffs’. As their complaint states, the motivation behind this lawsuit is to “restore the plaintiffs’ authority to engage in the video poker business.” Plaintiffs’ interpretation of § 2710(d)(1)(B) is inconsistent with IGRA’s stated purposes of promoting tribal economic development, self-sufficiency, and strong tribal governments. *See Artichoke Joe’s II*, 353 F.3d at 731 (“[T]he award of exclusive class III gaming franchises simply furthers the federal government’s long-standing trust obligations to Indian tribes and helps promote their economic self-development.”).

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In applying the presumption, we adopt the State's interpretation of the ambiguous phrase "any person, organization or entity," concluding that S.L. 2006-6, which legalizes the Tribe's Class III gaming rights, satisfies § 2710(d)(1)(B)'s requirement that North Carolina be a state "that permits such gaming for any purpose by any person, organization, or entity[.]" The trial court, therefore, erred in concluding that IGRA precluded North Carolina from granting the Tribe exclusive Class III gaming rights and entering judgment on this basis. We note, in conclusion that North Carolina's

decision to "permit" tribes to operate class III gaming facilities within the context of IGRA and the compacts, while denying those rights to other persons, organizations, and entities, is a policy judgment, which whether one agrees with it or not, does not conflict with IGRA's goal of maintaining state authority while protecting Indian gaming from discrimination. By contrast, to interpret IGRA to require the states to cho[o]se between no class III gaming anywhere and class III gaming everywhere would not further any of IGRA's goals and would limit the states' authority and flexibility without any resulting benefit to the tribes.

*Artichoke Joe's I*, 216 F. Supp. 2d at 1126. The trial court's order is reversed.

Reversed.

Judges GEER and STEPHENS concur.

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PHOENIX LIMITED PARTNERSHIP OF RALEIGH, PLAINTIFF v. SARAH W. SIMPSON, ROBERT T. SIMPSON, EDNA JACQUELYN STEED WRAY, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF CHARLES W. WRAY, AND SHW, LLC, DEFENDANTS

No. COA07-1333-2

(Filed 22 December 2009)

**1. Appeal and Error— interlocutory order—partial summary judgment—substantial right—specific performance**

Although defendants' appeal from the grant of partial summary judgment was from an interlocutory order in a case arising out of defendants' exercise of an option to sell certain property, the order granting specific performance to plaintiff and requiring

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defendants to convey the property to plaintiff affected a substantial right and was thus subject to immediate review.

**2. Contracts—breach—waiver of time is of the essence clause**

The trial court did not err by granting summary judgment in favor of plaintiff based on its conclusion that defendants had, as a matter of law, waived the time is of the essence clause in a case arising out of defendants' exercise of an option to sell certain property.

**3. Laches—failure to show change in condition or relations—failure to show prejudice**

The trial court did not err by dismissing defendants' affirmative defense of laches in a case arising out of defendants' exercise of an option to sell certain property.

Appeal by defendants from order entered 6 June 2007 by Judge Howard E. Manning, Jr. in Wake County Superior Court. Heard in the Court of Appeals 29 April 2008. Petition for rehearing allowed 1 May 2009. The following opinion supersedes and replaces the opinion filed 3 March 2009.

*Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Peter J. Marino and Scott A. Miskimon, for plaintiff-appellee.*

*Thomas W. Steed, Jr. for defendants-appellants.*

GEER, Judge.

This litigation arises out of defendants' exercise of an option to sell certain property to plaintiff. The parties did not close on the property by 13 March 2001, the date specified in the contract for closing. Plaintiff subsequently brought suit when defendants declined to close in the fall of 2004. Defendants have appealed from the trial court's order granting partial summary judgment to plaintiff on plaintiff's breach of contract claim and ordering that defendants specifically perform the contract by executing and delivering a general warranty deed transferring the property at issue to plaintiff.

While defendants correctly point out that the contract containing the option included a "time is of the essence" provision applicable to the contract's specified closing date of 13 March 2001, we agree with

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plaintiff that the undisputed facts establish that defendants waived that provision, and, therefore, plaintiff was not required to close on the property by the date specified in the contract. Generally, in the absence of a "time is of the essence" provision, the parties must perform within a reasonable amount of time of the date set for closing. In *Fletcher v. Jones*, 314 N.C. 389, 333 S.E.2d 731 (1985), however, our Supreme Court held that when the seller waived the original closing date, but indicated he still intended to perform once the condition to his performance was satisfied, the buyer's reasonable time for performance ran from the date the seller notified the buyer he was ready and able to close.

Here, the evidence is undisputed that defendants indicated to plaintiff they still intended to perform after waiving the original closing date, but that they never notified plaintiff they were ready and able to close. Therefore, under *Fletcher*, plaintiff was justified in waiting to tender its performance until it received such notice. Because defendants instead repudiated the contract, we affirm the trial court's grant of partial summary judgment on plaintiff's breach of contract claim and its order of specific performance.

### Facts

The undisputed facts are as follows. On 1 October 1995, plaintiff and defendants entered into a five-year lease agreement ("the contract"), pursuant to which defendants leased to plaintiff property located at 417 and 419 South McDowell Street in Raleigh ("the McDowell Street property"). Plaintiff owned an office building nearby and used the McDowell Street property as a surface parking lot for its tenants.

The contract contained a call option that granted plaintiff an option to purchase the McDowell Street property and a put option that granted defendants an option to require plaintiff to purchase the McDowell Street property. The contract also stated that upon exercise of either option, the purchase price would be the greater of \$853,781.60 or the fair market value of the McDowell Street property as of the date the option was exercised. Absent an agreement by the parties, the fair market value was to be determined based on the opinions of three appraisers. Plaintiff and defendants would each select one appraiser and those two appraisers would then select the third appraiser. The fair market value would be the average of the two closest appraisals from the three appraisers.

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The contract required that the closing take place on the date 180 days following the date the option was exercised. The contract contained a "time is of the essence" provision that stated: "With respect to the performance of the obligations and duties in this Section [relating to the options], time is of the essence." At closing, defendants were required to deliver a general warranty deed conveying the McDowell Street property to plaintiff, an affidavit stating that defendants were not foreign persons within the meaning of the Internal Revenue Code, a title insurance policy, a closing statement, and possession of the McDowell Street property.

On 13 September 2000, defendants provided plaintiff with written notice that they were exercising the put option. Pursuant to the terms of the contract, the deadline for the closing was 13 March 2001. The parties followed the appraisal process for selection of the appraisers. On 6 December 2000, at the request of two of the appraisers, the parties agreed to allow an additional 30 days for completion of the appraisals. On 8 December 2000, a Phase I Environmental Site Assessment reported the existence of multiple environmental problems, and, as a result, plaintiff requested a Limited Phase II Environmental Site Assessment.

In the meantime, the appraisers issued a report estimating the fair market value of the McDowell Street property at \$947,500.00. The report also stated, "We are aware that a Phase II environmental analysis is being conducted. As such, the foregoing value may require a downward adjustment in the event contaminants are found in, on, or near the subject site."

No closing occurred on or before 13 March 2001. On 26 March 2001, however, defendants executed a general warranty deed. That deed was delivered to Stephen D. Lowry, plaintiff's attorney. The deed was stamped "copy" and did not contain a notary seal or stamp.

The Limited Phase II Environmental Site Assessment dated 17 April 2001 reported that the groundwater contained traces of "VOCs exceeding the laboratory quantitation limits." Soil gas samples were also submitted for testing, and the laboratory analysis indicated "the presence of chlorinated VOCs and BTEX compounds." The environmental company, which conducted the tests, recommended that defendants, as the McDowell Street property owners, contact the North Carolina Department of Environment and Natural Resources ("NCDENR") to inform them of the site conditions. The company also stated that remedial measures might be necessary in order to be able

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to use the McDowell Street property depending on “the specific regulatory requirements applied.”

On 26 April 2001, plaintiff and defendants met to discuss the status of the transaction. The parties talked about the purchase price, the effect of the environmental problems on the McDowell Street property's value, the ability to develop the McDowell Street property and obtain financing, and the need to clean up the McDowell Street property. The parties disagree regarding what precisely was said during the meeting and what the outcome of the meeting was.

On 12 July 2001, defendants' realtor notified plaintiff that defendants had retained their own company to conduct further environmental tests to determine the source of the contamination. The letter specified that the company was in the process of gathering information and would prepare a reply to the environmental report obtained by plaintiff. In his letter, the realtor stated, “We will communicate with you as time goes by.”

In a letter dated 21 December 2001, defendants' realtor informed plaintiff that the investigation conducted by their environmental company indicated that “former dry cleaning activities conducted at the property are in part a likely source of the detected ground water contamination.” The letter also notified plaintiff that “there is sufficient information to enter the property into the North Carolina Dry-Cleaning Solvent Act [] program to provide financial assistance and limited third party liability protection.” The realtor stated that defendants intended to enter the McDowell Street property into the North Carolina Dry-Cleaning Solvent Act program (“the dry cleaning program”).

There was no further communication between the parties until 18 August 2004 when plaintiff's attorney sent a letter to defendants inquiring about the status of the McDowell Street property. In defendants' response on 23 September 2004, they informed plaintiff that the McDowell Street property had been listed for sale at a price of \$40.00 per square foot and advised plaintiff to contact them if plaintiff was interested in learning more about the McDowell Street property. On 21 January 2005, defendants entered into an agreement to sell the McDowell Street property to the Persimmon Group, LLC for \$1,352,560.00.

Plaintiff filed this action on 3 February 2005 seeking specific performance of the contract. Defendants filed their answer along with motions to dismiss. In their answer, defendants asserted the affirma-

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tive defenses of repudiation, nonperformance, waiver, abandonment/rescission, unclean hands/estoppel, and laches. Defendants also included counterclaims for intentional interference with contract and breach of contract.

On 23 September 2005, plaintiff filed a motion for partial summary judgment with respect to defendants' affirmative defenses and their counterclaim for breach of contract. On 19 December 2005, the trial court entered an order ruling that plaintiff was entitled to partial summary judgment on the affirmative defenses of abandonment, waiver, rescission, and anticipatory repudiation. The court further ruled:

Because there has been no "closing" and no final adjustment of the contract purchase price according to the terms of the contract, summary judgment on Phoenix's claim for specific performance and the Defendants' claim for breach of contract and issues related to the performance of both parties under the contract is not ripe for disposition at this point in the case.

The trial court ordered that those issues would "remain to be determined at a later time in the event this matter is not closed according to the terms of the contract."

At the request of all parties, the court conducted a hearing on 13 September 2006 to clarify its order. The court ultimately filed an amended order on 21 September 2006, explaining that it had viewed the defense of laches as subsumed under the dismissal of the abandonment affirmative defense, and, therefore, defendants' affirmative defense of laches should also be dismissed.

On 29 March 2007, plaintiff moved for partial summary judgment on defendant's liability for breach of contract, defendants' defense of unclean hands/estoppel, and plaintiff's entitlement to specific performance. On 6 June 2007, the trial court entered an order concluding that there were no genuine issues of material fact and that plaintiff was entitled to judgment as a matter of law on each issue. The court also incorporated by reference its prior rulings into the order. It then concluded that defendants were jointly and severally liable for breach of the contract to convey the McDowell Street property to plaintiff. The trial court "in its discretion" also determined that plaintiff was "entitled to specific performance of the contract to convey the Property" and ordered defendants to execute and deliver to plaintiff a general warranty deed conveying the McDowell Street property to

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plaintiff within 30 days of the date of the filing of the order. The order specified that the purchase price was \$947,500.00 with that amount “not subject to any claimed offset for the Property’s diminished value due to the Property’s environmental condition or the cost to clean up or remediate the Property.” Defendants timely appealed to this Court from the trial court’s grant of partial summary judgment.

Discussion

[1] As a preliminary matter, we note that defendants’ appeal is from an interlocutory order. Nevertheless, we agree with defendants that the order of the trial court granting specific performance to plaintiff and requiring defendants to convey the McDowell Street property to plaintiff affects a substantial right. *See Watson v. Millers Creek Lumber Co.*, 178 N.C. App. 552, 554, 631 S.E.2d 839, 840-41 (2006) (acknowledging that appeal from order granting partial summary judgment in case involving land purchase installment contract was interlocutory, but holding that order affected substantial right as it implicated title rights to disputed property). We, therefore, turn to the merits of defendants’ appeal.

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C.R. Civ. P. 56(c). The party moving for summary judgment has the burden of establishing the lack of any triable issues. *Collingwood v. Gen. Elec. Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). Once the moving party meets its burden, then the non-moving party must “produce a forecast of evidence demonstrating that [it] will be able to make out at least a prima facie case at trial.” *Id.* In opposing a motion for summary judgment, the non-moving party “may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” N.C.R. Civ. P. 56(e). This Court reviews de novo a trial court’s decision to grant summary judgment. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004).

## I

[2] Defendants first point to the “time is of the essence” provision contained in the contract as supporting their claim that they were not required to convey the McDowell Street property to plaintiff in the fall of 2004. Defendants acknowledge that plaintiff con-

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tends that this provision was waived, but argue that issues of fact exist regarding waiver.

As this Court has explained: “Waiver is always based upon an express or implied agreement. There must always be an intention to relinquish a right, advantage or benefit. The intention to waive may be expressed or implied from acts or conduct that naturally leads the other party to believe that the right has been intentionally given up.” *Fairview Developers, Inc. v. Miller*, 187 N.C. App. 168, 172, 652 S.E.2d 365, 368 (2007) (quoting *Patterson v. Patterson*, 137 N.C. App. 653, 667, 529 S.E.2d 484, 492, *disc. review denied*, 352 N.C. 591, 544 S.E.2d 783 (2000)), *disc. review denied*, 362 N.C. 176, 658 S.E.2d 484 (2008).

While, as *Fairview Developers* acknowledges, a waiver may be express or implied, there is no contention in this case that there was an express waiver of the “time is of the essence” clause. The issue before this Court is, therefore, whether the undisputed facts establish an implied waiver. “Although ‘[w]aiver is a mixed question of law and fact[, w]hen the facts are determined, it becomes a question of law.’” *Cullen v. Valley Forge Life Ins. Co.*, 161 N.C. App. 570, 575, 589 S.E.2d 423, 428 (2003) (quoting *Hicks v. Home Sec. Life Ins. Co.*, 226 N.C. 614, 619, 39 S.E.2d 914, 918 (1946)), *disc. review denied sub nom. Santomassimo v. Valley Forge Life Ins. Co.*, 358 N.C. 377, 598 S.E.2d 138 (2004).

It is undisputed that defendants did not insist on closing on the date specified in the contract notwithstanding the contract’s “time is of the essence” clause. Defendants, however, point to the fact that they tendered a signed warranty deed within a short period of time after the closing date. They note that in *Fairview Developers*, 187 N.C. App. at 173, 652 S.E.2d at 368, this Court held that a defendant did not waive a “time is of the essence” clause when the defendant expressed it was ready, willing, and able to close two days after the original closing date. The defendant in *Fairview Developers*, however, expressly “agreed to close” two days after the original closing date, *id.*, while, in this case, defendants only delivered a non-recordable “copy” of a deed and did not tender the remaining documents required under the contract for the closing.

Defendants also point to their evidence of what occurred at the April meeting—more than a month after the closing date—and defendants’ and their attorney’s belief, based on that meeting, that plaintiff had no intention of purchasing the property and that the deal was

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dead. Defendants, however, cite to no evidence that they ever told plaintiff that they were insisting on the closing date specified in the contract or that, prior to the fall of 2004, they advised plaintiff that they deemed the contract terminated for failure to close. *See Danville Lumber & Mfg. Co. v. Gallivan Bldg. Co.*, 177 N.C. 104, 107, 97 S.E. 718, 720 (1919) (“The secret understanding or intent of the parties is immaterial on the question of waiver.”). To the contrary, defendant Sarah Simpson testified that, prior to the April meeting, she expected the closing to occur a month or two later—long after the contract’s specified closing date.

Moreover, following that meeting, defendants sought permission for their environmental consultant to contact plaintiff’s consultant to discuss the condition of the McDowell Street property, and defendants’ consultant performed its own tests on the property. On 12 July 2001, defendants’ realtor wrote plaintiff “[w]ith regards to the sale and purchase of the [McDowell Street] property” in order to provide plaintiff with information about defendants’ environmental consultant. After indicating that the consultant “has started the process of gathering information,” he promised that “[w]e will communicate with you as time goes by.” On 21 December 2001, the realtor forwarded another letter to plaintiff “[w]ith regards to the sale and purchase of the [McDowell Street] property” that described the results of defendants’ environmental consultant’s investigation, promised a copy of the report “shortly after the holidays,” and expressed defendants’ intention to enter the property into the State’s dry cleaning program.

These undisputed facts demonstrating that defendants not only never insisted on closing on the specified closing date, but made statements and took actions manifesting an intent that closing should occur at some unspecified later date establish that defendants waived the “time is of the essence” clause. *See Harris & Harris Const. Co. v. Crain & Denbo, Inc.*, 256 N.C. 110, 119, 123 S.E.2d 590, 596 (1962) (holding that waiver “is a question of intent, which may be inferred from a party’s conduct”). The undisputed facts establish conduct that naturally would lead plaintiff to believe that defendants had dispensed with their right to insist that time was of the essence with respect to closing on the property. *See Medearis v. Trustees of Myers Park Baptist Church*, 148 N.C. App. 1, 12, 558 S.E.2d 199, 206-07 (2001) (“A waiver is implied when a person dispenses with a right by conduct which naturally and justly leads the other party to believe that he has so dispensed with the right.” (internal quotation marks

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omitted)), *disc. review denied*, 355 N.C. 493, 563 S.E.2d 190 (2002). Accordingly, the trial court did not err in concluding that defendants had, as a matter of law, waived the “time is of the essence” clause. *Id.* at 14, 558 S.E.2d at 208 (affirming grant of summary judgment on issue of waiver when “Petitioners, by their conduct and statements, impliedly led respondents to believe that petitioners dispensed with their right” to enforce restrictive covenants).

Defendants argue, however, that even if waiver of the “time is of the essence” clause is established, that waiver does not mandate judgment in plaintiff’s favor. Defendants point out that in North Carolina, absent a “time is of the essence” clause, the parties to a real property purchase agreement are allowed a “‘reasonable time after the date set for closing to complete performance.’” *Ball v. Maynard*, 184 N.C. App. 99, 102, 645 S.E.2d 890, 893 (quoting *Dishner Developers, Inc. v. Brown*, 145 N.C. App. 375, 378, 549 S.E.2d 904, 906, *aff’d per curiam*, 354 N.C. 569, 557 S.E.2d 528 (2001)), *disc. review denied*, 362 N.C. 86, 656 S.E.2d 591 (2007). Defendants contend there are issues of fact regarding whether the time that elapsed between the original closing date and the date plaintiff sought to close was a reasonable period of time in which to complete performance.

This argument, however, presumes that the reasonable time for performance in this case should be calculated from the original date set for closing. Our Supreme Court’s decision in *Fletcher*, requires, however, that we hold otherwise.

In *Fletcher*, 314 N.C. at 390, 333 S.E.2d at 733, the plaintiff and the defendant entered into a contract providing that the plaintiff would purchase certain property from the defendant for \$45,000.00. The closing date set out in the contract was 9 January 1981. The contract provided, however, that the sale was subject to the defendant’s obtaining a divorce from his spouse or the spouse’s agreeing to execute a deed to the property. When the condition was not satisfied on 9 January 1981, the parties entered into an addendum to the contract that extended the closing date to 10 March 1981. *Id.*

Despite the fact that 10 March 1981 came and went without the parties closing on the contract, the defendant and his attorney repeatedly assured the plaintiff and her attorney that although the defendant was not ready to close on the contract yet because his divorce was not finalized, the defendant intended to close on the contract soon. *Id.* at 391, 33 S.E.2d at 733. On 4 August 1981, the de-

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defendant notified the plaintiff that his divorce was finalized and he was ready to close on the sale, but neither party took any action after that notice to arrange a closing on the property. *Id.* During the third week of September 1981, the defendant accepted another offer to purchase the property and subsequently notified the plaintiff that the contract between the defendant and the plaintiff was void. *Id.* at 391-92, 33 S.E.2d at 733. On 26 September 1981, the plaintiff's attorney advised the defendant's attorney that the plaintiff intended to enforce the contract and also tendered the entire amount of cash due at closing, along with a properly executed promissory note for the balance of the purchase price as required by the contract. *Id.* at 395-96, 33 S.E.2d at 736. When the plaintiff subsequently sued for specific performance, the defendant contended the plaintiff had failed to tender performance within a reasonable time. The trial court ordered the defendant to perform the contract, and the defendant appealed. *Id.* at 392, 33 S.E.2d at 734.

The Supreme Court held that the defendant had waived the 10 March 1981 closing date through oral representations and assurances of the defendant's willingness to close on the contract. The Court agreed with the Court of Appeals that as a result of this waiver, the reasonable time doctrine applied, but disagreed with the Court of Appeals' conclusion "that the reasonable time for performance was to be computed from [the 10 March 1981 closing date]." *Id.* at 394, 333 S.E.2d at 735. Instead, the Court held that once the 10 March 1981 closing date had been waived, then the parties were "required to tender performance concurrently"—and thus the reasonable time period began running—when the defendant notified the plaintiff on 4 August 1981 that he was ready and able to move forward with the closing. *Id.* at 395, 333 S.E.2d at 735. The Court then held that the trial court's findings supported its conclusion of law that plaintiff "made full and sufficient tender" within a reasonable time after being notified that defendant was ready to close." *Id.* at 399, 333 S.E.2d at 738. We find *Fletcher's* analysis controlling in this case.

Plaintiff argues that defendants' conduct in proceeding with the environmental cleanup of the McDowell Street property indicated to plaintiff that defendants still intended to perform under the contract once the cleanup was completed. The contract between the parties contained the following provision:

Indemnifications. Tenant shall indemnify, defend, and hold Landlord harmless from and against any and all claims, judg-

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ments, suits, causes of action, damages, penalties, fines, liabilities, losses, and expenses that arise during or after the term of this Lease as a result of the breach by Tenant of any of Tenant's obligations and covenants set forth in this Section 39; provided, however, *Tenant shall not be responsible for any costs or expenses relating to the remediation or cleanup of Hazardous Materials which were located on, under, or about the Property prior to the date of this Lease* or which are placed or discharged on or about the Property unless caused by Tenant or Tenant's employees, contractors, or agents (collectively, the "Non-Tenant Conditions"). *Landlord agrees to indemnify, defend, and hold Tenant harmless from any and all claims, damages, fines, judgments, penalties, costs, liabilities, or losses arising during or after the term of this Lease from or in connection with any Non-Tenant Conditions* or the breach by Landlord of any of Landlord's obligations, duties, covenants, and representations in this Section 39.

(Emphasis added.)

Under that provision, plaintiff could recover from defendants for losses or damages incurred by plaintiff as a result of environmental contamination on the McDowell Street property. While defendants might be able to mitigate their potential liability by undertaking remediation, this indemnification provision did not require that defendants do so. Defendants could, under this provision, choose simply to reimburse plaintiff for the costs or expenses incurred for any cleanup.

Plaintiff argues that although defendants may not have been contractually obligated under the lease agreement to remediate any environmental problems on the property, defendants by their conduct indicated to plaintiff that they had elected to do so rather than reduce the purchase price to reflect their liability for any contamination found on the McDowell Street property. Therefore, plaintiff contends, defendants needed to notify it that they had completed the cleanup and were ready and able to perform under the contract before the reasonable time period for plaintiff's performance would begin running.

We find plaintiff's reasoning persuasive. As in *Fletcher*, where the defendant continually reassured the plaintiff that he was waiting for his divorce to be finalized and that he was planning to close on the contract as soon as that condition happened, here, defendants' con-

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duct in pursuing an environmental cleanup—including hiring their own environmental consultant, telling plaintiff that they were conducting an environmental investigation, notifying plaintiff of the results of that investigation, and stating that they wanted to enroll the McDowell Street property in the State's dry cleaning program—coupled with the fact that an environmental cleanup could take years to complete, indicated to plaintiff that defendants still intended to perform under the contract despite the passing of the original closing date.

Under *Fletcher*, in order for the clock to start ticking on the reasonable time frame, defendants were required to notify plaintiff that they had completed their cleanup and were ready and able to perform. The Supreme Court in *Fletcher* assessed the reasonableness of the time frame between the date that the defendant notified the plaintiff that his divorce had been finalized and he was ready and able to perform and the date on which the plaintiff tendered his performance. Here, however, the evidence is undisputed that defendants never notified plaintiff that they were ready and able to perform and, therefore, the reasonable time for plaintiff's performance had not yet begun.

When plaintiff inquired about the status of the cleanup and defendants' ability to perform, rather than notifying plaintiff that they were ready to close on the contract, defendants instead told plaintiff that they had placed the property back on the market at a higher price than the contract price, and they subsequently entered into an agreement to sell the property to another buyer. Plaintiff contends that this action constituted an anticipatory breach. "The doctrine of anticipatory breach is well known: when a party to a contract gives notice that he will not honor the contract, the other party to the contract is no longer required to make a tender or otherwise perform under the contract because of the anticipatory breach of the first party." *First Union Nat. Bank of N.C. v. Naylor*, 102 N.C. App. 719, 724, 404 S.E.2d 161, 163 (1991) (quoting *Dixon v. Kinser*, 54 N.C. App. 94, 101, 282 S.E.2d 529, 534 (1981), *disc. review denied*, 304 N.C. 725, 288 S.E.2d 805 (1982)).

Because by their words and conduct, defendants indicated that they would no longer honor the contract, plaintiff was excused from its obligation to tender the purchase price and had an action for breach of contract. *See id.* at 724-25, 404 S.E.2d at 164 (affirming grant of summary judgment to plaintiff where defendant anticipato-

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rily breached their contract). We, therefore, affirm the trial court's grant of partial summary judgment to plaintiff.

## II

[3] Defendants also contend the trial court erred in dismissing their affirmative defense of laches. Defendants argue that plaintiff's claim is barred by laches because of plaintiff's three-year delay in asserting its claim. "Laches is an affirmative defense that requires proof of three elements: (1) the delay must result in some change in the property condition or relations of the parties, (2) the delay must be unreasonable and harmful, and (3) the claimant must not know of the existence of the grounds for the claim." *N.C. State Bar v. Gilbert*, 189 N.C. App. 320, 329, 663 S.E.2d 1, 7, *disc. review denied*, 362 N.C. 682, 670 S.E.2d 234 (2008). It is well established that "the mere passage of time is insufficient to support a finding of laches . . . ." *MMR Holdings, LLC v. City of Charlotte*, 148 N.C. App. 208, 209, 558 S.E.2d 197, 198 (2001).

Here, we need not address the second two elements of laches because defendants failed to show that the delay resulted in a change in the McDowell Street property's condition or the relations of the parties. *See Teachey v. Gurley*, 214 N.C. 288, 294, 199 S.E. 83, 88 (1938) ("In equity, where lapse of time has resulted in some change in the condition of the property or in the relations of the parties which would make it unjust to permit the prosecution of the claim, the doctrine of laches will be applied."). The sole prejudice from the delay identified by defendants is (1) the increase in value of the McDowell Street property as a result of the siting of the Raleigh Civic Center and (2) the loss of a significant witness due to illness.

With respect to the increase in value, that increase was fortuitous and not due to any action taken by defendants during the delay that increased the value of the property. *Compare Farley v. Holler*, 185 N.C. App. 130, 133, 647 S.E.2d 675, 678 (2007) (concluding that plaintiff's claims were barred by laches when "the delay of time has resulted in both a change in the condition of the property through the \$100,000 in repairs to the street and a change in the relations of the parties through the changing of the owners of the lots in the subdivision"). Any prejudice suffered by defendants did not arise out of the delay in plaintiff's bringing suit, but rather arose out of the contract's provision that the property would be valued as of the exercise date of the option. This prejudice cannot support defendants' claim of laches.

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With respect to the availability of defendants' witness, Steven Kenney, defendants cite to no evidence in the record supporting their assertions. We have found none. The record reveals that Mr. Kenney was deposed, and he also submitted an affidavit on defendants' behalf. We, therefore, affirm the trial court's dismissal of defendants' laches defense.

Affirmed.

Judges WYNN and CALABRIA concur.

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No. COA08-629

(Filed 22 December 2009)

**1. Injunctions— preliminary—modification—standard of review**

Where a modification of a preliminary injunction dissolved certain aspects of the injunction and maintained others, the standard of review was abuse of discretion rather than *de novo*.

**2. Injunctions— first judge recused—modification by second judge**

A second judge did not err by modifying a preliminary injunction where the first judge recused himself after entry of the injunction and could not have revisited the ruling. The second judge stepped into the shoes of the first and could, in his discretion, rule on the injunction without a change of circumstances. Moreover, a comprehensive New York action involved a change of circumstances sufficient to support modification.

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**3. Trials— stay—action in another jurisdiction—within the discretion of the court**

The entry of an order staying an action so that it can be tried in another jurisdiction was within the discretion of the trial judge. The trial judge did not abuse his discretion by staying a North Carolina action where he thoroughly identified and analyzed the appropriate factors and reached the reasonable conclusion that staying the North Carolina action was a just result in light of a more comprehensive New York action.

Appeal by plaintiffs from order entered 14 March 2008 by Judge Albert Diaz in Mecklenburg County Superior Court. Heard in the Court of Appeals 13 January 2009.

*Robinson, Bradshaw & Hinson, P.A., by Martin L. Brackett, Jr., Robert W. Fuller, and Katherine G. Maynard, for plaintiffs-appellants.*

*Rayburn Cooper & Durham, P.A., by C. Richard Rayburn, Jr., James B. Gatehouse, and Ross R. Fulton; Quinn Emanuel Urquhart Oliver & Hedges, LLP, by Michael B. Carlinsky, Robert S. Loigman, and Adam Wolfson, pro hac vice, New York, New York, for defendants-appellees.*

HUNTER, Robert C., Judge.

On 14 March 2007, plaintiffs Wachovia Bank, National Association (“Wachovia Bank”) and Wachovia Capital Markets, LLC (“WCM”) (collectively, the “Wachovia Plaintiffs”) filed a complaint in Mecklenburg County Superior Court against eight hedge funds: (1) Harbinger Capital Partners Master Fund I, Ltd.; (2) Aurelius Capital Master, Ltd.; (3) Aurelius Capital Partners, LP; (4) Taconic Opportunity Fund, L.P.; (5) Schultze Master Fund, Ltd.; (6) UBS Willow Fund, L.L.C.; (7) Arrow Distressed Securities Fund; and (8) Latigo Master Fund, Ltd. (collectively, the “Fund Defendants”) and against six of the Fund Defendants’ managing agents: (1) Harbinger Capital Partners Offshore Manager, L.L.C.; (2) Aurelius Capital GP, LLC; (3) Aurelius Capital Management, LP; (4) Taconic Capital Management, LLC; (5) Bond Street Capital LLC; and (6) Latigo Partners, L.P. (collectively the “Agent Defendants”).<sup>1</sup> In the complaint, the Wachovia

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1. Defendants Taconic Opportunity Fund, L.P. and Taconic Capital Management, LLC, settled with the Wachovia Plaintiffs, are no longer parties in the instant case, and are not included in the respective categories of Fund Defendants or Agent Defendants. We refer to both the Fund Defendants and the Agent Defendants collectively as “Defendants.”

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Plaintiffs asserted claims for: (1) champerty and maintenance, arguing that Defendants had attempted to purchase and were intent on asserting over \$100 million dollars in tort claims against the Wachovia Plaintiffs; (2) unfair and deceptive trade practices based on Defendants' purported illegal trafficking in tort claims; and (3) indemnity due to the Fund Defendants' purported refusal to make indemnity payments owed to Wachovia Bank. In addition, the Wachovia Plaintiffs sought a declaratory judgment that the Fund Defendants could not assert the tort claims that they had purportedly purchased. The Wachovia Plaintiffs appeal from an order entered 14 March 2008 by Superior Court Judge Albert Diaz, which: (1) modified a prior preliminary injunction and permitted the Fund Defendants to assert state law tort claims against WCM in the United States District Court for the Southern District of New York; and (2) stayed the Wachovia Plaintiffs' North Carolina action. After careful review, we affirm.

### I. Background

Wachovia Bank is a national banking association, with its principal place of business in Mecklenburg County, North Carolina. WCM is a Delaware limited liability company and an affiliate of Wachovia Bank, with Mecklenburg County also being its principal place of business. Sometime around 1 September 2006, pursuant to an "Amended and Restated Credit Agreement" ("Credit Agreement"), Wachovia Bank arranged and underwrote approximately \$285 Million dollars in loans for Le-Nature's, Inc. ("Le-Nature's"), a Pennsylvania entity, which at that time was in the business of developing and marketing bottled water and other noncarbonated beverages. Wachovia Bank funded a portion of the Credit Agreement directly and created a syndicate of lenders to fund the balance of the loan ("Credit Facility"). WCM was not a party to the Credit Facility but "served as Lead Arranger and Sole Bookrunner for the transaction." WCM transferred or "syndicated" interests in the Credit Facility to investors pursuant to Section 9.6(c) of the Credit Agreement and the Commitment Transfer Supplement ("Supplement"), which was authorized by Section 9.6(c) of the Credit Agreement.

A secondary market exists for interests in syndicated loans. Some of the investors who obtained an interest in the Credit Facility directly from the Wachovia Plaintiffs ("Original Lenders") further assigned their interests on the secondary market to other investors ("Purchasing Lenders") pursuant to the Supplement. Each investor that became a member of the Credit Facility through this process,

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whether it was an Original Lender or a Purchasing Lender, became a “‘Lender’ under and within the meaning of the Credit Agreement.”

Both the Credit Agreement and the Supplement explicitly state that North Carolina law governs. “[T]o the extent permitted . . . under applicable law,” the Supplement also provides for the assignment of:

all claims, suits, causes of action and any other right of the Assignor (in its capacity as a Lender) against any Person, whether known or unknown, arising under or in connection with the Credit Agreement, any other documents or instruments delivered pursuant thereto or the loan transactions governed thereby or in any way based on or related to any of the foregoing, including, but not limited to, contract claims, *tort claims*, malpractice claims, statutory claims and all other claims at law or in equity related to the rights and obligations sold and assigned . . . .

(Emphasis added.)

On 1 November 2006, an involuntary bankruptcy petition was filed against Le-Nature’s after it was discovered that Le-Nature’s had engaged in massive fraud and provided materially misleading financial information to investors. Following the bankruptcy filing and revelation of Le-Nature’s actions, numerous members of the Credit Facility sold some or all of their Credit Facility interests on the secondary market to other investors, including the Fund Defendants here. In other words, the Fund Defendants are investors who obtained their interests in the Credit Facility on the secondary market subsequent to the revelation that Le-Nature’s had engaged in fraud and Le-Nature’s being forced into bankruptcy. These transfers were also effectuated through the Supplement, which states that North Carolina law controls. In addition to utilizing the Supplement to effectuate these transfers, however, the Fund Defendants entered into separate agreements with their respective assignors. Neither Wachovia Bank nor WCM were parties to these separate agreements. These agreements: (1) provide for the assignment of certain third party tort claims and causes of action to the extent permitted by law; (2) state that New York law governs; and (3) “purport to override any contrary terms of the Supplements.”<sup>2</sup>

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2. The Fund Defendants and Agent Defendants assert that these agreements were based on the standard forms created by the Loan Syndications and Trading Association (“LSTA”). In support, they offered an affidavit from Elliot Ganz, General Counsel for the LSTA. According to Mr. Ganz, in 2006, approximately \$40 Billion in distressed debt—such as Le-Nature’s debt—was traded in the United States, and, since 1995, the

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In addition to filing their complaint on 14 March 2007, the Wachovia Plaintiffs moved for a temporary restraining order against Defendants. Superior Court Judge Robert Bell entered a “Temporary Restraining Order and Notice of Hearing on Preliminary Injunction Motion,” which, among other things, enjoined Defendants from

asserting, filing, prosecuting, attempting to assign or re-assign, or otherwise pursuing any Personal Tort Claims against [the Wachovia] Plaintiffs or any of their Agents (or any of the [Wachovia] Plaintiffs’ direct or indirect parent or subsidiary entities, or any Agents of such entities) that arise from or relate in any respect to credit extended by any entity to Le-Nature’s, Inc.

Judge Bell further specified that:

The Personal Tort Claims . . . include but are not limited to each and every [one] of the following statutory or common law claims or causes of action, whether under the law of North Carolina or of any other state: (i) claims for fraudulent and negligent omissions or misrepresentations, or both, (ii) claims alleging constructive fraud, (iii) negligence claims, (iv) breach of fiduciary duty claims, (v) tortious interference claims, (vi) unfair trade practice claims, (vii) racketeering claims, (viii) conspiracy with respect to or to commit any of the aforelisted claims, or to commit any other wrongful act or omission, and (ix) aiding or abetting with respect to or to commit any of the aforelisted claims, or to commit any other wrongful act or omission.

On 29 March 2007, Superior Court Judge Robert C. Ervin heard the Wachovia Plaintiffs’ Motion for Preliminary Injunction, and on 12 April 2007, entered an order granting a preliminary injunction. In the decretal portion of his order, Judge Ervin ordered:

1. Except as expressly permitted in paragraphs 3 and 4 below, the Fund Defendants and all of their officers, agents, ser-

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250-member LSTA has been devoted to developing a fair, efficient, and liquid market for distressed loans. “Wachovia Bank . . . is a full member of the LSTA and is represented on the LSTA Board . . . .” Wachovia Bank is also a member of the LSTA’s Trade Practices and Forms Committee, which is charged with the “principal responsibility for the drafting and revision of the LSTA’s standard forms[.]” and Wachovia is represented in the “various [LSTA] working groups” that deal with “the drafting of forms specific to the trading of distressed debt.” The LSTA Standard Terms and Conditions provide that sales of interests in distressed credit facilities include all of the seller’s rights to assert legal claims against third-parties related to the debt and require parties to LSTA Purchase Agreements to submit any claims arising out of debt transfers to a New York court applying New York law.

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vants, employees, and attorneys, and all persons and entities acting in active concert or participation with them who receive actual notice in any manner of this Order by personal service or otherwise (the “Enjoined Persons and Entities”), are hereby enjoined from asserting, filing, prosecuting, attempting to assign or transfer in any other manner, or otherwise pursuing any Personal Tort Claims as defined in paragraph 2 below against the [Wachovia] Plaintiffs or any Wachovia Employees that were assigned to any one or more Fund Defendant(s) arising from or relating in any respect to credit extended to Le-Nature’s, Inc. and its affiliates pursuant to the Credit Agreement in any court other than this Court against Wachovia [Bank], WCM, and/or their past or present agents, employees, officers, directors, or other[s] acting on their behalf whose actions Wachovia [Bank] or WCM would be responsible under the doctrine of respondeat superior or under other similar legal principles (all of which agents, employees, officers, directors and others are hereby jointly referred to as “Wachovia Employees”) to the extent arising from any acts or omissions of Wachovia [Bank], WCM or any Wachovia Employees with respect to Plaintiffs’ roles relating to the Credit Agreement.

2. The Enjoined Persons and Entities are prohibited from asserting, as set forth in paragraph one above, the following statutory or common law causes of action, *whether arising under the law of North Carolina or of any other state* (collectively “Personal Tort Claims”): (a) fraudulent and negligent omissions or misrepresentations, or both, (b) constructive fraud, (c) negligence, (d) breach of fiduciary duty, (e) tortious interference, (f) unfair trade practices, (g) racketeering, (h) conspiracy to commit any of the aforelisted causes of action, (i) aiding or abetting the commission of any of the aforelisted causes of action, and (j) any other causes of action found in whole or in part upon allegedly tortious conduct.

3. The Fund Defendants may, but are not required to, assert in this action, any assigned Personal Tort Claims against Plaintiffs and/or Wachovia Employees. Further, notwithstanding anything to the contrary set forth in the immediately preceding paragraphs of this Order, the Enjoined Persons and Entities are not enjoined in any respect from bringing or asserting in any court or assigning any contract claims against [the Wachovia] Plaintiffs and/or Wachovia Employees.

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4. The Enjoined Persons and Entities are not enjoined from assigning, and [the Wachovia] Plaintiffs will not suffer irreparable harm should Defendants in the future assign, any Personal Tort Claims against [the Wachovia] Plaintiffs and/or Wachovia Employees that were assigned to any Defendants arising from or relating in any respect to credit extended to Le-Nature's, Inc. pursuant to the Credit Agreement, provided that if the assignee is not a Fund Defendant as of the date of this Order, such assignee (and each such subsequent assignee, if there are multiple future assignments) must be provided by the assignor with a copy of this Order and must execute and deliver to counsel for the [Wachovia] Plaintiffs a Consent and Agreement, in the form attached hereto, and must agree (a) to consent to be joined as a defendant in this action and to this Court exercising jurisdiction over the assignee in this Court for purposes of this Preliminary Injunction and the litigation of the [Wachovia] Plaintiff[s]' claims concerning the validity and legality of the assignment of Personal Tort Claims and (b) to be fully bound by and comply in all respects with this Preliminary Injunction as if the assignee were currently named as a Fund Defendant herein, unless and until this Preliminary Injunction is lifted; and (c) to refrain from further assignment or attempted assignment of such Personal Tort Claims unless each further assignee executes and delivers the Consent and Agreement form attached hereto, and agrees to the conditions and restrictions in this paragraph.

(Emphasis added.) In this order, Judge Ervin also deferred ruling on Defendants' "Motion to Dismiss for lack of personal jurisdiction . . . pending expedited jurisdictional discovery and supplementation of the record."

On 30 March 2007, prior to the entry of the order granting the preliminary injunction, Judge Ervin wrote a letter to the parties' respective counsel informing them that his wife had recently applied for employment with the Wachovia Foundation and instructed them to "[l]et [him] know if this create[d] a problem or if [they] need[ed] additional information about this." On 2 April 2007, counsel for the Wachovia Plaintiffs informed Judge Ervin that this did not create a concern for the Wachovia Plaintiffs and that they were nearly finished preparing "an Order memorializing" Judge Ervin's decision regarding the preliminary injunction. On 3 April 2007, counsel for Defendants wrote to Senior Resident Superior Court Judge Robert P. Johnston, requesting that the case be designated as an " 'exceptional'

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case” pursuant to “Rule 2.1 of the General Rules of Practice for the Superior and District Courts” and that the case be assigned to Judge Ervin. On 4 April 2007, counsel for the Wachovia Plaintiffs requested that the case “be assigned to the Business Court after Judge Ervin . . . entered his Order granting the Preliminary Injunction and disposed of the Personal Jurisdiction motion (with respect to which he allowed discovery, now in progress)” because Judge Ervin owned Wachovia stock and his wife had recently unsuccessfully applied for a job with the Wachovia Foundation. Counsel for the Wachovia Plaintiffs noted that even though the current parties had waived these potential conflicts, there was a possibility that additional defendants would be added to the case, and there was no guarantee that these new parties would waive the conflict. Consequently, counsel for the Wachovia Plaintiffs suggested that the case be assigned to Special Superior Court Judge Albert Diaz after the entry of “the Order granting the Preliminary Injunction . . .” On 14 May 2007, Supreme Court Chief Justice Sarah Parker entered an order designating this action as “*exceptional*” and assigned the case to Judge Diaz.

On 17 September 2007, the Fund Defendants and 10 of the Original Lenders filed a complaint in the United States District Court for the Southern District of New York (the “New York Action”) against: (1) WCM (but not against Wachovia Bank); (2) BDO Seidman, LLP, (“BDO”), the outside auditor for Le-Nature’s from 2003 through 2006; (3) Gregory J. Podlucky (“Podlucky”), Le-Nature’s majority and controlling shareholder and its Chairman and Chief Executive Officer; and (4) Robert Lynn (“Lynn”), an Executive Vice President of Le-Nature’s. This complaint asserted claims by all of the plaintiffs in that action against: (1) Podlucky and Lynn for violating the federal Racketeer Influenced and Corrupt Organizations Act (“RICO”); (2) all of the defendants for conspiracy to violate RICO; and (3) BDO for fraud, aiding and abetting fraud, and negligent misrepresentation. The Original Lenders also asserted state law claims against WCM for, among other things, fraud, aiding and abetting fraud, and negligent misrepresentation.

On 18 September 2007, the Defendants filed a “Motion to Dissolve Preliminary Injunction and Stay Action[.]” The Wachovia Plaintiffs opposed the Defendants’ motion and moved to hold the Fund Defendants in contempt for violating the preliminary injunction by asserting the purportedly assigned federal RICO claims.

In an order entered 14 March 2008, Judge Diaz modified Judge Ervin’s preliminary injunction to allow the Fund Defendants “to at-

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tempt to assert in the New York Action all claims arising from their [respective] acquisition of interests in the Credit Facility.” Judge Diaz further declared that the “portion of Judge Ervin’s preliminary injunction order barring Defendants from further assignment of Personal Tort Claims to entities not a party to this litigation, except on the express terms set forth in [Judge Ervin’s] order” was to “remain in full force and effect.” Judge Diaz also entered a stay of this action; however, he concluded that if “WCM prevail[ed] on its motion to dismiss in the New York Action, [he] would obviously revisit [the] stay order.” Judge Diaz deferred ruling on the Wachovia Plaintiffs’ contempt motion and Defendants’ motion to dismiss for lack of personal jurisdiction.

Both WCM and BDO moved to dismiss the New York Action. In a “Memorandum Decision” filed 26 August 2008, United States District Court Judge Denny Chin dismissed the federal RICO claims, determining that the Plaintiffs in that case “lack[ed] statutory standing to sue under RICO [as] their damages ha[d] yet to become ‘clear and definite’ and [were] thus unripe.”<sup>3</sup> Noting that jurisdiction as to the state law claims against WCM and BDO was based on supplemental jurisdiction and not diversity jurisdiction, Judge Chin dismissed the state law claims as well. The Plaintiffs in the New York Action appealed, and, on 9 October 2009, the Second Circuit affirmed the dismissal.<sup>4</sup>

## II. Analysis

On appeal, the Wachovia Plaintiffs assert that Judge Diaz erred by modifying the preliminary injunction and staying their North Carolina action. We disagree with both contentions.

### A. Interlocutory Appeal: Preliminary Injunction

The parties agree that the entry of the stay is immediately appealable pursuant to N.C. Gen. Stat. § 1-75.12(c) (2007), which provides in pertinent part: “Whenever a motion for a stay . . . is granted, any non-moving party shall have the right of immediate appeal. Whenever such a motion is denied, the movant may seek review by means of a writ of certiorari . . . .” The parties disagree, however, as to whether the modification of the preliminary injunction is immediately appeal-

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3. See *Harbinger Capital Partners Master Fund I, Ltd. v. Wachovia Capital Markets, LLC*, No. 07 Civ. 8139(DC), 2008 U.S. Dist. LEXIS 67462 \*12, 2008 WL 3925175 \*4 (S.D.N.Y. 2008) (memorandum decision).

4. See *Harbinger Capital Partners Master Fund I, Ltd. v. Wachovia Capital Markets, LLC*, No. 08-4692-cv, 2009 U.S. App. LEXIS 21657, 2009 WL 3161357 (2d Cir. 2009) (slip opinion).

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able. We need not address this issue as we grant the Wachovia Plaintiffs' petition for writ of certiorari pursuant to Rule 21(a)(1) of the Rules of Appellate Procedure to address whether Judge Diaz erred in modifying the preliminary injunction. *See DaimlerChrysler Corp. v. Kirkhart*, 148 N.C. App. 572, 577, 561 S.E.2d 276, 281 (2002) ("[W]e need not determine whether the preliminary injunction affects a substantial right . . . because we have elected to grant Defendants' petition for writ of certiorari pursuant to [Rule] 21(a)(1) to address the merits of this appeal."), *disc. review denied*, 356 N.C. 668, 577 S.E.2d 113 (2003).

**B. Modification of the Preliminary Injunction**

[1] As a preliminary matter, the Wachovia Plaintiffs argue that the standard of appellate review applicable to the trial court's modification of the preliminary injunction is *de novo*. We have not found any North Carolina caselaw clearly articulating the proper standard of review for a trial court's modification of a preliminary injunction. In *Barr-Mullin, Inc. v. Browning*, 108 N.C. App. 590, 597-98, 424 S.E.2d 226, 231 (1993), however, the defendants asserted on appeal that the trial court erred in entering a preliminary injunction and "in denying their Motion for Reconsideration and Motion to Dissolve Preliminary Injunction." This Court "note[d]" that appellate review of the initial grant of the preliminary injunction was "essentially *de novo*." *Id.* at 594, 424 S.E.2d at 228. In contrast, the Court held that "a refusal to dissolve a temporary injunction is addressed to the discretion of the trial court and can only be set aside if there is an abuse of discretion." *Id.* at 598, 424 S.E.2d at 231. Here, Judge Diaz's modification of the preliminary injunction dissolves certain aspects of Judge Ervin's preliminary injunction order and maintains others; consequently, we conclude that the abuse of discretion standard applies in this case.

[2] Turning to the Wachovia Plaintiffs' argument, they do not assert that if Judge Ervin had remained on this case, he would not have had the discretion to revisit his preliminary injunction order and modify it. Rather, they contend that Judge Diaz, after the case was reassigned to him, erred in modifying the preliminary injunction because he overruled another superior court judge, something he could not do "absent a finding of changed factual circumstances." They further contend that Judge Diaz's order "identifies no change in factual circumstance that could warrant modification of the Injunction."

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Our Supreme Court has recognized that

it is well established in our jurisprudence that no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action. When the above-noted situation arises, the second judge may reconsider the order of the first judge only in the limited situation where the party seeking to alter that prior ruling makes a sufficient showing of a substantial change in circumstances during the interim which presently warrants a different or new disposition of the matter.

*State v. Woolridge*, 357 N.C. 544, 549-50, 592 S.E.2d 191, 194 (2003) (internal citations and quotation marks omitted); *accord Calloway v. Motor Co.*, 281 N.C. 496, 505, 189 S.E.2d 484, 490 (1972) (concluding modification requires showing "intervention of new facts which bear upon the propriety" of the previous order). "The burden of showing the change in circumstances is on the party seeking a modification or reversal of an order previously entered by another judge." *First Fin. Ins. Co. v. Commercial Coverage, Inc.*, 154 N.C. App. 504, 507, 572 S.E.2d 259, 262 (2002).

Here, Judge Ervin's recusal from this case subsequent to the entry of the preliminary injunction order in the Wachovia Plaintiffs' favor created a situation in which Judge Ervin could not revisit his preliminary injunction ruling and another trial judge necessarily would have to consider the matter. The record indicates that the Wachovia Plaintiffs asked for the recusal due to their concern that if additional defendants were added to the case in the future, those defendants might possibly object to Judge Ervin presiding over the matter due to his owning Wachovia stock and his wife's applying for employment with the Wachovia Foundation. Contrary to Defendants' assertion, we do not believe that this constitutes "judge shopping[.]" which, in and of itself, obviated the necessity of a finding of a change in circumstances. *Woolridge*, 357 N.C. at 550, 592 S.E.2d at 194 (internal quotation marks omitted). However, given that Judge Ervin's recusal barred him from revisiting the matter, we believe that Judge Diaz, because the case was reassigned to him by the Chief Justice, stepped into Judge Ervin's shoes and could, in his discretion, revisit the preliminary injunction and rule on it absent a finding of changed circumstances.

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Defendants nevertheless argue that even if Judge Diaz was required to determine that sufficient changed circumstances existed to support the modification of Judge Ervin's preliminary injunction order, the filing of the more comprehensive New York Action constituted a sufficient change in circumstances to support the modification. Defendants point to Judge Diaz's findings that: (1) the Fund Defendants and other holders of interests in the Credit Facility had banded together to sue in a single action, in a single forum—the Southern District of New York; (2) the New York Action included a “broader scope of claims and parties” than the North Carolina action; and (3) by virtue of the claims and parties involved, the New York Action is “better able to arrive at a more comprehensive resolution of the litigation.”

Here, Judge Diaz determined that the more comprehensive New York Action eliminated the threat of the Wachovia Plaintiffs' facing a multiplicity of lawsuits in multiple forums relating to the assigned claims, which was the concern articulated by Judge Ervin in his order granting the preliminary injunction. While the Agent Defendants are not parties to the New York Action, Judge Diaz correctly recognized that the Agent Defendants have no direct interests in the Credit Facility and, therefore, have no claims to pursue against the Wachovia Plaintiffs arising from those interests. Moreover, while the plaintiffs in the New York Action did not assert any federal or state claims against Wachovia Bank, Judge Diaz determined that because WCM is an affiliate of Wachovia Bank, WCM could adequately represent Wachovia Bank's interests.

The Wachovia Plaintiffs contend that “North Carolina case law squarely rejects th[e] argument” that the filing of the New York Action constitutes a sufficient change in circumstances. The Wachovia Plaintiffs first claim that because the filing of the New York Action was an event anticipated or foreseen by Judge Ervin, it does not amount to a change in circumstances. In support of their contention, they rely on *Britt v. Britt*, 49 N.C. App. 463, 271 S.E.2d 921 (1980). *Britt*, however, does not involve the issue of one superior court judge's overruling another on the basis of changed circumstances. Rather, *Britt* addresses whether, in accordance with N.C. Gen. Stat. § 50-16.9 (2007) (modification of an alimony or postseparation support order), a decrease in the income of a parent who is paying alimony and an increase in the income of a parent who is receiving alimony is, by itself, a substantial change in circumstances supporting the decrease of the original alimony award. *Id.* at 469-71, 271

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S.E.2d at 926-27. *Britt* does not stand for the proposition for which it is asserted by the Wachovia Plaintiffs—nowhere in *Britt* does this Court address whether a foreseeable event may constitute a change in circumstances sufficient to support a modification of a prior order. Consequently, *Britt* is inapposite here.

Next, citing to *Wolf v. Wolf*, 151 N.C. App. 523, 566 S.E.2d 516 (2002), and *Mittendorff v. Mittendorff*, 133 N.C. App. 343, 515 S.E.2d 464 (1999), the Wachovia Plaintiffs argue that the New York Action does not amount to a sufficient change in circumstances because “[a]n enjoined party cannot take voluntary action . . . and then contend that its action warrants modification of a Preliminary Injunction[,]” particularly where the action violates the injunction. Neither *Wolf* nor *Mittendorff* support the Wachovia Plaintiffs’ argument, however. Both cases, like *Britt*, deal with modification of an alimony or postseparation order. Neither case involves a preliminary injunction or, consequently, whether an enjoined party’s conduct in violation of an injunction may result in a change of circumstances warranting modification of the injunction.

Finally, while Judge Diaz declined to rule on the Wachovia Plaintiffs’ motion to hold the Fund Defendants in contempt for filing a federal RICO claim against WCM in the New York Action, Judge Ervin’s preliminary injunction order does not explicitly enjoin the Fund Defendants from asserting claims against the Wachovia Plaintiffs that arise under federal law. Rather, it prohibits them “from asserting . . . [various] statutory or common law causes of action, *whether arising under the law of North Carolina or of any other state.*” (Emphasis added.)

In sum, we do not believe that under the facts of this case Judge Diaz was required to find that a change in circumstances had occurred in order to allow him to modify Judge Ervin’s preliminary injunction order. Assuming, *arguendo*, that a determination that a change in circumstances was necessary, we conclude that the more comprehensive New York Action was a sufficient change in circumstances to support Judge Diaz’s modification of the preliminary injunction.

### C. Entry of Stay

[3] The Wachovia Plaintiffs next challenge Judge Diaz’s staying this action under N.C. Gen. Stat. § 1-75.12(a), which authorizes a trial court to stay an action in this State in order to allow the action to be

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tried in another jurisdiction. In *Lawyers Mut. Liab. Ins. Co. of N.C. v. Nexsen Pruet Jacobs & Pollard*, 112 N.C. App. 53, 356, 435 S.E.2d 571, 573 (1993), this Court enumerated several factors the trial court may consider in evaluating whether to stay an action pursuant to N.C. Gen. Stat. § 1-75.12(a):

(1) the nature of the case, (2) the convenience of the witnesses, (3) the availability of compulsory process to produce witnesses, (4) the relative ease of access to sources of proof, (5) the applicable law, (6) the burden of litigating matters not of local concern, (7) the desirability of litigating matters of local concern in local courts, (8) convenience and access to another forum, (9) choice of forum by plaintiff, and (10) all other practical considerations.

Similar to their argument regarding modification of the preliminary injunction, the Wachovia Plaintiffs claim that the trial court's decision whether to enter a stay pursuant to N.C. Gen. Stat. § 1-75.12(a) should be reviewed de novo on appeal. Contrary to the Wachovia Plaintiffs' contention, however, this Court has consistently held that "[e]ntry of an order under G.S. 1-75.12 is a matter within the sound discretion of the trial judge and will not be disturbed on appeal absent an abuse of that discretion." *Home Indemnity Co. v. Hoechst-Celanese Corp.*, 99 N.C. App. 322, 325, 393 S.E.2d 118, 120, *appeal dismissed and disc. review denied*, 327 N.C. 428, 396 S.E.2d 611 (1990); *accord Lawyers Mut.*, 112 N.C. App. at 356, 435 S.E.2d at 573 ("declin[ing]" to review de novo entry of stay based on *Home Indemnity Co.* and reviewing for abuse of discretion). While a trial court does not abuse its discretion by not considering "each and every factor," the court does abuse its discretion

if it abandons any consideration of these factors which this Court has deemed relevant in determining whether a stay is warranted. Further, in determining whether to grant a stay, it is not necessary that the trial court find that *all* factors positively support a stay, as long as it is able to conclude that (1) a substantial injustice would result if the trial court denied the stay, (2) the stay is warranted by those factors present, and (3) the alternative forum is convenient, reasonable, and fair.

*Lawyers Mut.*, 112 N.C. App. at 357, 435 S.E.2d at 574.

Here, Judge Diaz's order specifies that the *Lawyers Mutual* factors governed the motion to stay and states that he "carefully consid-

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ered the[se] factors deemed relevant by our appellate courts when ruling on a motion to stay.” While Judge Diaz recognized that “the record here is silent as to most of the[se] factors[,]” the “available [evidence] on the question [led him] to conclude that a stay is appropriate.” In his order, Judge Diaz extensively discussed the relevant factors and determined:

(112) I find that the SDNY is a fair and convenient forum for the litigation of the claims before me. I also reject the notion that granting Defendants’ Motion to Stay “simply shift(s) the inconvenience from one party to another.” . . .

(113) Instead, my decision merely recognizes the practical reality that the New York Action is better able to arrive at a more comprehensive resolution of the litigation, given the broader scope of claims and parties before it. As a result, while this Court is certainly capable of handling this case, judicial economy counsels against my proceeding further.

(114) In sum, I have determined that (1) a stay is warranted by those factors present on the record before me, (2) the SDNY is a convenient, reasonable, fair, and more comprehensive forum for the resolution of this litigation, and (3) it would work a substantial injustice for this action to be tried in North Carolina.

Having carefully reviewed Judge Diaz’s order, we conclude that he did not abuse his discretion in staying the Wachovia Plaintiffs’ North Carolina action. Judge Diaz’s order thoroughly identifies and analyzes the applicable *Lawyers Mutual* factors and reaches a reasonable conclusion that, in light of the more comprehensive New York Action, staying the North Carolina action is a just result.<sup>5</sup> We, therefore, affirm.

Affirmed.

Judges STEELMAN and JACKSON concur.

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5. We note that Judge Diaz concluded his order stating that if the New York Action were dismissed, he “would obviously revisit [his] stay order.”

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[201 N.C. App. 522 (2009)]

STANLEY BARRETT, EMPLOYEE, PLAINTIFF v. ALL PAYMENT SERVICES, INC.,  
EMPLOYER, AND NORTH CAROLINA INSURANCE GUARANTY ASSOCIATION,  
CARRIER, DEFENDANTS

No. COA09-541

(Filed 22 December 2009)

**1. Workers' Compensation— temporary partial disability—  
ability to earn wages—post-injury average weekly wage**

The Industrial Commission erred in a workers' compensation case by awarding plaintiff employee temporary partial disability compensation and the case is remanded because the Commission failed to make findings about plaintiff's ability to earn wages in other fields and plaintiff's post-injury average weekly wages.

**2. Workers' Compensation— total disability—sufficiency of  
evidence**

The Industrial Commission did not err in a workers' compensation case by awarding plaintiff employee total disability beginning two weeks prior to 30 August 2001 and continuing until further order of the Commission based on finding 32. Although defendants contend the finding was contradicted by competent evidence of record, the Court of Appeals' duty goes no further than determining whether the record contains any evidence tending to support the finding, and finding 32 was supported by unchallenged findings 1, 28, and 29.

**3. Workers' Compensation— average weekly wage—improper  
use of wages from other jobs**

Although the Industrial Commission did not err in a workers' compensation case by using method five under N.C.G.S. § 97-2(5) to calculate plaintiff employee's average weekly wage, it misapplied the method by including wages from jobs other than the one on which he was injured. The case was remanded for a recalculation of the average weekly wage.

Appeal by defendants and cross-appeal by employee from an opinion and award entered 26 November 2008 by the North Carolina Industrial Commission. Heard in the Court of Appeals 27 October 2009.

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[201 N.C. App. 522 (2009)]

*Law Office of G. Lee Martin, P.A., by G. Lee Martin, for employee-plaintiff.*

*Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Jerry L. Wilkins, Jr., and Dewana F. Looper, for defendants.*

BRYANT, Judge.

On 25 October 1993, employee-plaintiff Stanley Barrett sustained an admittedly compensable back injury at work. Defendant All Payment Services, Inc., Barrett's employer, accepted employee's claim on 3 July 2002. On 4 May 2006, employee requested the claim be assigned for hearing. Following a hearing, Deputy Commissioner Wanda Blanche Taylor issued an opinion and award on 21 March 2007. Both defendants and employee appealed to the Full Commission which issued an opinion and award on 26 November 2008. Both parties now appeal from the Full Commission's opinion and award. As discussed below, we affirm in part, reverse in part, and remand.

*Facts*

Employee has worked as a professional stuntman for more than three decades. In October 1993, he injured his back while performing a car jump stunt on the set of a television series called "Bandit, Bandit". Employee felt immediate back pain as his car landed from a jump at high speed. Employee sought medical attention and was diagnosed with acute lumbar pain secondary to trauma. Employee continued his stunt work for the final week of the show's production, despite instructions from his doctor that he refrain from doing so. Following the end of production, employee had continued low back and leg pain, and he was subsequently diagnosed with kidney and bladder contusions.

Between 1993 and 2001, employee continued his stunt work and received only conservative medical treatment for his back injury although his symptoms worsened. In August and September 2001, employee had two back surgeries. Following the second surgery, employee's physician opined that he had reached maximum medical improvement and assigned a 35% permanent partial impairment rating to his back.

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On appeal, defendants argue that the Full Commission erred in awarding employee: (I) temporary partial disability compensation at varying rates not to exceed \$442 per week for up to 300 weeks from

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the date of injury, and (II) temporary total disability compensation at the rate of \$442 per week beginning two months prior to 30 August 2001 and continuing until further order of the Commission. We agree in part and remand for additional findings as specified below.

Employee cross-assigns as error the Commission's use of method 5 under N.C. Gen. Stat. § 97-2(5) to calculate his average weekly wage, including the wages from jobs he worked other than the job on which he was injured. We agree in part and remand for recalculation of employee's average weekly wage.

*Standard of Review*

On appeal from an award of the Industrial Commission, our review is limited to determining whether competent evidence supports the Commission's findings of fact and whether those findings support the Commission's conclusions of law. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998), *reh'ing denied*, 350 N.C. 108, 532 S.E.2d 522 (1999); *see also Deese v. Champion Int'l Corp.*, 352 N.C. 109, 530 S.E.2d 549 (2000). We review matters of statutory interpretation of the Workers' Compensation Act de novo. *Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 605, 615 S.E.2d 350, 357, *disc. review denied*, 360 N.C. 63, 623 S.E.2d 582 (2005).

*Defendants' Arguments**I*

[1] Defendants first argue that the Commission erred in awarding employee temporary partial disability compensation at varying rates not to exceed \$442 per week for up to 300 weeks from the date of his injury because the Commission failed to make findings about employee's ability to earn wages in fields other than stunt work. We agree.

To support its conclusion of disability, the Commission must find the following:

- (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment,
- (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and
- (3) that this individual's incapacity to earn was caused by plaintiff's injury.

*Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). An employee may satisfy his burden under *Hilliard*

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in one of four ways: (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related [sic] injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

*Russell v. Lowes Prod. Distrib.*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (citations omitted).

Here, defendants do not challenge any particular findings as not being supported by competent evidence. Instead, defendants contend that the Commission failed to make the required findings under *Hilliard* and *Russell* about employee's ability to earn wages in fields other than stunt work during the period between his injury in October 1993 and 300 weeks later, July 1999.

Finding 31 specifies that, following his injury in 1993, employee was only able to earn wages as a stunt man or stunt coordinator sporadically through friendship gestures rather than on the competitive market and that "the Full Commission finds as fact that [employee] was temporarily and partially disabled as a result of his injury from the date of injury until approximately two months prior to his August 30, 2001 surgery." Finding 31 makes no mention of employee's ability to find work in fields other than stunt work. Finding 32 states:

[Employee]'s lower back condition progressively worsened over time and caused him to become totally disabled from working at least two months before August 30, 2001, when he underwent surgery. The Full Commission finds as fact that [employee] remains temporarily and totally disabled from work since reaching maximum medical improvement from his 2001 surgeries on September 1, 2003. Although [employee]'s physicians released him to "semi-sedentary" and "sedentary" work, and [employee] may be capable of some work, it would be futile for [employee] to seek employment, given his advanced age, his prior work history, his pre-existing conditions, his severely debilitating back condition due [to] his current work related [sic] injury as well as non work related [sic] causes and his work related [sic]

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physical restrictions. The Full Commission finds as fact, based upon the greater weight of the evidence, that [employee] became temporarily and totally disabled from working in any employment at least two months prior to August 30, 2001 and remains temporarily and totally disabled as a result of his October 25, 1993 work injury.

Thus, while the Commission made a finding of futility under the third prong of *Russell* in finding 32, this finding was related only to employee's temporary total disability which began two weeks before 30 August 2001. Neither finding 31, nor any other finding of fact, addresses employee's ability to earn wages in fields other than stunt work as required by *Hilliard* for the period between October 1993 and July 1999.

Defendants also argue that conclusions 3 and 4 are not supported because the Commission failed to make findings about employee's average weekly wage post-injury. Under N.C. Gen. Stat. § 97-30, temporary partial disability compensation is based on the difference between the employee's average weekly wage before and after the injury. *Thomason v. Fiber Indus.*, 78 N.C. App. 159, 162, 336 S.E.2d 632, 634 (1985), *disc. review denied*, 316 N.C. 202, 341 S.E.2d 573 (1986). Although conclusion 4 specifies that an employee should receive compensation based on the difference between his pre- and post-injury average weekly wage and specifies that the post-injury average weekly wage is to be "calculated using the same formula as used to calculate average weekly wage[,]" the Commission made no findings about employee's wages or earnings in the years following his injury.

We remand to the Commission for findings about employee's ability to earn wages in fields other than stunt work between his injury in October 1993 and July 1999 as required by *Hilliard* and findings about employee's post-injury average weekly wages which support its conclusions regarding employee's right to and amount of temporary partial disability compensation.

## II

[2] Defendants next argue that the Commission erred in awarding employee temporary total disability beginning two weeks prior to 30 August 2001 and continuing until further order of the Commission. Defendants contend that there are no findings to support the award of ongoing temporary total disability benefits after 3 September 2001. We disagree.

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In proving disability, “[t]he burden is on the employee to show that he is unable to earn the same wages he had earned before the injury, either in the same employment or in other employment.” *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457. Defendants argue that the Commission made no finding about employee’s ability to find work outside the stunt work field following his August 2001 surgery. However, as quoted above, finding 32 addresses this issue, stating that while he might be capable of some of work “it would be futile for [employee] to seek employment, given his advanced age, his prior work history, his pre-existing conditions, his severely debilitating back condition due [to] his current work related [sic] injury as well as non work related [sic] causes and his work related [sic] physical restrictions.” This conforms to the third method of proving disability discussed in *Russell* and fully supports the Commission’s conclusions.

In the alternative, defendants argue that finding 32 was “clearly contradicted by the competent evidence of record,” specifically by employee’s testimony that he worked as a stunt coordinator on a film in 2003 and could still do some stunt coordinating “depending on the show.” Defendants misstate the proper standard of review; this Court does not sift through the record, searching for evidence that might contradict the Commission’s findings. Rather, our “duty goes no further than to determine whether the record contains any evidence tending to support the finding.” *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965). Unchallenged finding 1 states that employee was born in 1943 and spent more than thirty-five years working as a stunt man or coordinator, and unchallenged findings 28 and 29 state that employee’s doctors felt he could undertake only sedentary work. This competent evidence fully supports finding 32. Defendants’ assignment of error is overruled.

*Employee’s Argument*

[3] Employee argues that the Commission erred in using method five under N.C. Gen. Stat. § 97-2(5) to calculate his average weekly wage and including wages from jobs other than the job on which he was injured. We conclude that the Commission properly used method five, but hold that it misapplied this method by including wages from other employers in computing employee’s average weekly wage.

We begin by noting that neither employee’s cross-assignment of error nor the argument in his brief specifically mentions any finding or conclusion by the Commission. However, as employee’s cross-

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assignment of error and argument both focus on the Commission's use of method five under N.C.G.S. § 97-2(5) to calculate his average weekly wage, we review his argument as a challenge to conclusion 2, which states:

2. The Full Commission concludes that exceptional reasons exist to utilize Method five(5) of §97-2(5) of the North Carolina General Statutes to compute [employee]'s average weekly wage. [Employee]'s work was contractual in nature and he would have periods of very high earnings, followed by periods where he did not work at all. The Full Commission therefore concludes that it is fair to both parties to compute [employee]'s wages based upon his earnings over the previous year from all of his jobs. At the time of [employee]'s October 25, 1993 work injury, [employee]'s average weekly wage was \$1,679.11 per week, which yields the maximum compensation rate for the year 1993 of \$442.00 per week. *Larramore v. Richardson Sports Ltd. Partners*, 141 N.C. App. 250, 540 S.E.2d 768 (2000), *aff'd* 353 N.C. 520, 546 S.E.2d 87 (2001); N.C. Gen. Stat. §97-2(5).

N.C.G.S. § 97-2(5) specifies, in order of preference, four methods of calculating an employee's average weekly wage:

"Average weekly wages" shall mean [1] the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury, including the subsistence allowance paid to veteran trainees by the United States government, provided the amount of said allowance shall be reported monthly by said trainee to his employer, divided by 52; [2] but if the injured employee lost more than seven consecutive calendar days at one or more times during such period, although not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks remaining after the time so lost has been deducted. [3] Where the employment prior to the injury extended over a period of fewer than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, results fair and just to both parties will be thereby obtained. [4] Where, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impractical to compute the average weekly wages as above de-

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fined, regard shall be had to the average weekly amount which during the 52 weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community.

N.C.G.S. § 97-2(5) (2009). This section then provides a fifth method: “where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.” *Id.* Here, the Commission employed method five. Plaintiff argues that the Commission should have used method three under § 97-2(5), dividing the wages earned during employee’s contract with employer by the number of weeks worked.

In unchallenged findings of fact 4, 5 and 6, the Commission noted the following. The nature of employee’s stunt work meant that he had short periods of very high earnings interspersed with periods when he did not work at all. Employee received \$60,000 for his six-week contract with employer. From all his work as a stunt man under various contracts with various employers, employee’s earnings, less residuals, were \$36,692.04 in 1992 and \$97,437.88 in 1993. The Commission found that using method three would be unfair to the employer, since it “would not fairly approximate the amount [employee] would be earning were it not for the injury.” Under method three, employee’s average weekly wage would be \$10,000.

The Supreme Court has held that method five

clearly may not be used unless there has been a finding that unjust results would occur by using the previously enumerated methods. *Wallace v. Music Shop, II, Inc.*, 11 N.C. App. 328, 181 S.E.2d 237 (1971)). Ultimately, the primary intent of this statute is that results are reached which are fair and just to both parties. *Liles v. Faulkner Neon & Elec. Co.*, 244 N.C. 653, 660, 94 S.E.2d 790, 795-96 (1956). “Ordinarily, whether such results will be obtained . . . is a question of fact; and in such case a finding of fact by the Commission controls decision.” *Id.*

*McAninch v. Buncombe County Sch.*, 347 N.C. 126, 130, 489 S.E.2d 375, 378 (1997). Since methods one, two and four under § 97-2(5) could not be used, and since method three gave an unfair result, the Commission correctly turned to method five. *See Loch v. Entm’t Ptnrs.*, 148 N.C. App. 106, 111-12, 557 S.E.2d 182, 186 (2001) (approv-

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ing the use of method five for determining the average weekly wage of a part-time actor who worked only five days out of the preceding 52 weeks).

We next consider the Commission's inclusion of wages from all of his employers in making its calculation under method five. A long line of cases has disapproved using wages earned from an employer other than that in whose employment the injury occurred in determining average weekly wage. "When an employee who holds two separate jobs is injured in one of them, his compensation is based only upon his average weekly wages earned in the employment producing the injury." *Joyner v. A.J. Carey Oil Co.*, 266 N.C. 519, 521, 146 S.E.2d 447, 449 (1966). Further, an "employee who unfortunately breaks his leg while working at a weekly Saturday-only job has his compensation calculated upon his average weekly wage from that job, not his regular forty-hour-a-week employment." *Richardson v. N.C. Dept. of Corr.*, 345 N.C. 128, 136, 478 S.E.2d 501, 506 (1996) (citation omitted).

In *McAninch*, the employee was a school cafeteria worker who worked forty-two weeks out of the year in that position and took seasonal employment during school summer vacation. 347 N.C. at 128, 489 S.E.2d at 376. The Full Commission used method three under § 97-2(5) to calculate the employee's average weekly wage, dividing the wages earned during employee's work at the school by the number of weeks worked. This Court reversed the Commission and used method five to recalculate the employee's wages, including wages from her non-school summer employment. *Id.* at 130-31, 489 S.E.2d at 378.

The Supreme Court reversed, reasoning that calculating the employee's average weekly wage by including wages from the additional jobs was unfair to the employer:

It seems reasonable to us that the Legislature, having placed the economic loss caused by a workman's injury upon the employer for whom he was working at the time of the injury, would also relate the amount of that loss to the average weekly wages which that employer was paying the employee. Plaintiff, of course, will greatly benefit if his wages from both jobs are combined; but, if this is done, [the employer] and its carrier, which has not received a commensurate premium—will be required to pay him a higher weekly compensation benefit than [the employer] ever paid him in wages. . . . [T]o combine plaintiff's wages from his two employments would not be fair to the employer.

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*Id.* at 133, 489 S.E.2d at 379 (quoting *Barnhardt v. Yellow Cab Co.*, 266 N.C. 419, 427, 146 S.E.2d 479, 485 (1966)). The Court made “no distinction between the concurrent employment involved in *Barnhardt* and sporadic, seasonal employment [in *McAninch*].” *Id.* at 134, 489 S.E.2d at 380. The Court in *McAninch* also explicitly overruled our decision in *Holloway v. T.A. Mebane, Inc.*, 111 N.C. App. 194, 431 S.E.2d 882 (1993), the case most similar to the present facts. In *Holloway*, the employee hung doors and installed weatherstripping, working for various employers for short periods of time and being paid on a job-by-job basis. *Id.* at 195, 431 S.E.2d at 882. We affirmed the Commission which had calculated the employee’s average weekly wage by averaging his net income from all employers for the years preceding his injury. *Id.* at 199-200, 431 S.E.2d at 885. In *McAninch*, the Court specifically overruled this practice as inconsistent with prior case law and the relevant statutes: “Accordingly, we hold that the definition of ‘average weekly wages’ and the range of alternatives set forth in the five methods of computing such wages, as specified in the first two paragraphs of N.C.G.S. § 97-2(5), do not allow the inclusion of wages or income earned in employment or work other than that in which the employee was injured.” *McAninch*, 347 N.C. at 134, 489 S.E.2d at 380.

Here, the Commission approximated employee’s average weekly wage by dividing his earnings from all his stunt work over the preceding year by 52 weeks. Plaintiff contends that the Commission erred in considering income earned in jobs other than the six-week contract employment he had with employer. In light of the cases discussed *supra*, we are compelled to agree. The Commission faced a difficult task in determining employee’s average weekly wage, and the calculation it used does appear to “most nearly approximate the amount which the injured employee would be earning were it not for the injury.” N.C.G.S. § 97-2(5).<sup>1</sup>

However, we can find no meaningful distinction between the Commission’s calculation here and that in *Holloway*, which the

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1. We also note that the method used here gives substantially the same result as the fourth method under N.C.G.S. § 97-2(5) might have done. Finding 4 states that there was not another stunt man of the “same grade and character” in the local community from which the Commission could draw insight; this is not surprising given employee’s unusual occupation and his apparently high level of achievement in it. Were another stunt person of the “same grade and character” as Mr. Barrett to be injured, surely the Commission could regard Mr. Barrett’s total annual earnings from all work in approximating that hypothetical employee’s average weekly wage. However, under our case law, Mr. Barrett is prohibited from doing the same here.

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Supreme Court has specifically disallowed. Unfortunately, *McAninch* provides no guidance as to the correct calculation to employ under method five as that case was remanded to the Commission for re-statement of its award based upon a Form 21 agreement between the parties about the employee's weekly wage. 347 N.C. at 134, 489 S.E.2d at 380. We remand to the Commission for recalculation of employee's average weekly wage without consideration of income earned from other employers. However, should discretionary review be granted, we urge the Supreme Court to consider this issue and provide guidance to the Commission and this Court by suggesting a calculation that would most nearly approximate employee's earnings before the injury without considering his wages from other employers.

On remand, the Commission shall take such additional evidence as necessary, specify the method employed, and make sufficient findings in order to support its opinion and award.

**AFFIRMED IN PART, REVERSED IN PART AND REMANDED.**

Judges WYNN and McGEE concur.

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LORENZ RINNA, OBO CITY OF MANNHEIM DEPARTMENT OF CHILDREN'S SERVICES, PLAINTIFFS V. STEVEN B., AND SABINE B., DEFENDANTS

No. COA09-845

(Filed 22 December 2009)

**1. Appeal and Error— motion to amend record on appeal—attachment—of necessary documents**

The Court of Appeals did not sanction respondents for violations of the appellate rules since none of the violations were jurisdictional, nor did they rise to the level of being gross and substantial. Petitioner's motion to dismiss was deemed, in the alternative, to be a motion to amend the record on appeal to add the necessary attachments to the record on appeal.

**2. Child Custody, Support, and Visitation— petition filed under Hague Convention—verification requirement for petition—motion to dismiss**

The failure of the trial court to verify under N.C.G.S. § 50-308(a) a petition that was filed under the Hague Convention

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to return a minor child to Germany deprived the court of subject matter jurisdiction over that petition, and the order granting relief under the Hague Convention was vacated. The juvenile proceeding initiated by DSS remained pending because respondents had not yet obtained a ruling on their motion to dismiss the juvenile petition.

Appeal by respondents from orders entered 14 April 2009 and 28 April 2009 by Judge Paul Quinn in Carteret County District Court. Heard in the Court of Appeals 9 November 2009.

*Andrew A. Lassiter for plaintiff-appellee Mannheim Department of Children's Services; and Stephanie Sonzogni for petitioner-appellee Carteret County Department of Social Services.*

*Duncan B. McCormick for respondent-appellant father.*

*Wyrick Robbins Yates & Ponton LLP, by Tobias S. Hampson, for respondent-appellant mother.*

GEER, Judge.

Respondents appeal from the trial court's orders mandating the return of their minor child, Christopher,<sup>1</sup> to Germany under the Hague Convention on the Civil Aspects of International Child Abduction ("the Hague Convention"). The United States is a party to the Hague Convention. *Bader v. Kramer*, 445 F.3d 346, 349 (4th Cir. 2006). The purpose of the Hague Convention is "to secure the prompt return of children wrongfully removed to or retained in any Contracting State" and "to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States." Hague Convention art. 1. "The Hague Convention provides a mandatory remedy of return that is meant both 'to preserve the status quo' with respect to child custody and 'to deter parents from crossing international boundaries in search of a more sympathetic court.'" *Bader*, 445 F.3d at 349 (quoting *Miller v. Miller*, 240 F.3d 392, 398 (4th Cir. 2001)).

The United States implemented the Hague Convention through the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. § 11601 *et seq.* (2006). State and federal courts have concurrent juris-

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1. The pseudonym "Christopher" is used throughout this opinion to protect the juvenile's privacy and for ease of reading.

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diction over an action brought under the Hague Convention. 42 U.S.C. § 11603 (a) (2006). In North Carolina, a petition brought under the Hague Convention is governed by Part 3 of Article 2 of the Uniform Child-Custody Jurisdiction and Enforcement Act (“UCCJEA”), N.C. Gen. Stat. § 50A-301 *et seq.* (2007).

The Hague Convention petition filed in this case by the Mannheim Department of Children’s Services (“Mannheim DCS”) was not verified in violation of N.C. Gen. Stat. § 50A-308(a) (2007). In *In re T.R.P.*, 360 N.C. 588, 591, 636 S.E.2d 787, 790 (2006), the Supreme Court held that the failure to verify a juvenile petition deprives the trial court of subject matter jurisdiction, reasoning that when a parent’s constitutionally protected rights to his or her child are at stake, verification is no “mere ministerial or procedural act.” Because we believe the reasoning of *T.R.P.* applies equally to petitions filed under the Hague Convention, we vacate the trial court’s order for lack of subject matter jurisdiction.

Facts

On 28 August 2008, the Carteret County Department of Social Services (“DSS”) filed a petition alleging that Christopher was an abused, neglected, and dependent juvenile. DSS alleged in the petition that it was notified in August 2008 by the United States Department of State that Christopher, a German citizen, had been illegally removed from Germany by respondent mother and was living with respondent mother and respondent father in Carteret County, North Carolina. The State Department sought DSS’ assistance with respect to Christopher.

According to the petition, DSS also received a letter from Mannheim DCS dated 14 August 2008, asserting that respondent mother’s removal of Christopher to the United States was in direct contravention of a German court order granting Mannheim DCS guardianship and placement authority over Christopher. The letter indicated that Christopher was not safe living with respondent father because the father had been convicted in Germany of physically abusing Christopher’s step-sister and was strongly suspected of having caused Shaken Baby Syndrome in Christopher’s infant brother. Further, Mannheim DCS believed that respondent mother was not capable of protecting Christopher because she had also been the victim of abuse by respondent father. Mannheim DCS requested that DSS take steps to ensure the safety and welfare of Christopher.

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The DSS petition alleged that on 22 August 2008, it received a copy of a German court order dated 12 March 2008 that named Mannheim DCS as Christopher's guardian and withdrew custody from respondents. The order found that Christopher had initially been placed in foster care but that he "was taken by his mother into her household on 12/16/2007." According to the order, respondent mother had then broken into Christopher's foster home, stolen his passport, and removed him from Germany without the consent of Mannheim DCS.

On 29 August 2008, the trial court entered a non-secure custody order placing Christopher in the custody of DSS. On 3 September 2008, DSS amended the juvenile petition to withdraw the allegations of neglect and abuse, leaving only the allegation of dependency. Respondents filed a joint motion to dismiss the petition on 14 October 2008 and a joint answer to the petition on 28 October 2008.

DSS filed a motion to continue the adjudication proceedings on 24 November 2008 to allow time for Mannheim DCS to seek registration and enforcement of the German orders and to obtain translation of those orders since respondents had expressed their intent to challenge the facts found in the orders. On 7 January 2009, DSS filed an additional motion explaining that the trial court had emergency jurisdiction to enter the non-secure custody order, but that the trial court could continue to exercise jurisdiction in the juvenile proceeding only upon receipt of an order from the German courts indicating that those courts did not wish to retain jurisdiction. The DSS motion requested that the trial court communicate with Germany to determine if Germany intended to retain jurisdiction in the matter or, in the alternative, requested that the trial court grant DSS additional time to allow Mannheim DCS to provide an order addressing the issue.

On 5 February 2009, Lorenz Rinna, on behalf of Mannheim DCS, filed in Carteret County District Court a "Complaint/Petition Under the Hague Convention," seeking an order returning Christopher to Germany under the Hague Convention. In an order entered 14 April 2009, the trial court granted Mannheim DCS' petition, concluding that Mannheim DCS has legal custody of Christopher and that it was in the best interests of Christopher that he be immediately returned to the custody of Mannheim DCS. The trial court stayed the order pending appeal, but ordered that Christopher remain in the temporary custody of DSS. The trial court also consolidated the juvenile proceedings with the Hague Convention proceedings. The trial court entered

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an amended order on 28 April 2009 that caused the order returning Christopher to Germany to be entered in both the juvenile proceeding and the Hague Convention proceeding. Respondents timely appealed to this Court.

Discussion

[1] As an initial matter, we address Mannheim DCS' motion to dismiss respondents' appeal. We decline to sanction respondents for violations of the appellate rules because none of the alleged violations are jurisdictional, and we cannot conclude, under the circumstances of this case, that any violations rise to the level of being gross and substantial. *See Dogwood Dev. & Mgm't Co. v. White Oak Transp. Co.*, 362 N.C. 191, 199, 657 S.E.2d 361, 366 (2008) ("[T]he appellate court may not consider sanctions of any sort when a party's noncompliance with nonjurisdictional requirements of the rules does not rise to the level of a 'substantial failure' or 'gross violation.' In such instances, the appellate court should simply perform its core function of reviewing the merits of the appeal to the extent possible.").

One issue raised by Mannheim DCS' motion does warrant further discussion. The record on appeal as filed with this Court contains Mannheim DCS' petition under the Hague Convention, but does not indicate that the petition had any attachments. In her brief on appeal, respondent mother argues that the petition should have been dismissed because it did not attach certified copies of the order sought to be enforced. Mannheim DCS has, however, submitted the affidavit of a Deputy Clerk of Court for Carteret County, Lanie B. Gray, attesting that a certified copy of the child custody order of the Mannheim Family Court in Germany was in fact filed as an attachment to the Hague Convention petition.

Respondent father's attorney acknowledges that he took responsibility for preparing the record on appeal. In his response to the motion to dismiss, counsel pointed out that the German orders, including the one attached to the Hague Convention petition, were attached to multiple pleadings. He explained: "I elected to include these documents only once . . . ." He indicated to the parties that he was doing so in a cover letter sent with the proposed record on appeal to the other parties. No one objected to this approach.

We appreciate counsel's intent to limit the size of the record on appeal by eliminating duplicative documents. We do not, however, agree with how he went about doing so, and we have concerns

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about the other parties' failure to properly review the proposed record on appeal.

First, nothing in the record on appeal advises the Court that duplicative documents have been omitted. At the place in the record in which a document was omitted, counsel should have included a notation of that fact. In other words, if a document had multiple attachments, counsel should have included a page listing the attachments that were omitted and referring to the pages in the record on appeal where copies of those documents could be found.

Second, when a document is necessary to establish the jurisdiction of the trial court, it should be included in the record on appeal. Such a document is a "paper[] filed . . . which [is] necessary to an understanding of all errors assigned unless they appear in the verbatim transcript of proceedings which is being filed with the record pursuant to Rule 9(c)(2)" and must be included in the record on appeal. N.C.R. App. P. 9(a)(1)(j). As this Court recently emphasized, subject matter jurisdiction may not be waived, and this Court has not only the power, but the duty to address the trial court's subject matter jurisdiction on its own motion or *ex mero motu*. *In re C.N.C.B.*, 197 N.C. App. 553, 555, 678 S.E.2d 240, 241 (2009). Consequently, if the record on appeal omits a document necessary to establish the trial court's jurisdiction—without any indication to this Court that the document has been omitted for space reasons—the Court could erroneously vacate the appealed order for lack of jurisdiction.

Finally, although respondent father, whose counsel prepared the record on appeal, did not argue that the Hague Convention petition failed to attach the German orders, respondent mother did make this argument, apparently not realizing that respondent father's counsel had elected to omit the filed documents. Since respondent mother is an appellant, she had equal responsibility with respondent father for ensuring that the record on appeal contained all the documents required by Rule 9 of the Rules of Appellate Procedure. Counsel cannot simply assume that his or her co-counsel has properly compiled the record on appeal. On the other hand, counsel for respondent father should not have remained silent when he received respondent mother's brief and saw her mistake.

Mannheim DCS is not, however, totally without fault. Respondent father's counsel's letter did explain what he had done in preparing the record on appeal. Moreover, a quick review of the record on appeal, which is not voluminous, would have revealed to Mannheim DCS that

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the attachments to its petition had been omitted. The proper procedure would have been to object to the documents' omission. If the omission was discovered after the docketing of the record on appeal in this Court, Mannheim DCS could have moved to amend the record on appeal to add the necessary attachments. Mannheim DCS has yet to do so.

Nonetheless, we deem its motion to dismiss to be, in the alternative, a motion to amend the record on appeal, and we allow that motion. We, therefore, need not address respondent mother's argument that the Hague Convention petition should have been dismissed for failure to attach the German order.

**[2]** Turning to the merits, respondent father first argues that the trial court lacked subject matter jurisdiction over the Hague Convention petition filed by Mannheim DCS because that petition was not verified. N.C. Gen. Stat. § 50A-302 (2007), located in Part 3 of Article 3 of the UCCJEA, provides that "a court of this State may enforce an order for the return of the child made under the Hague Convention on the Civil Aspects of International Child Abduction as if it were a child-custody determination." N.C. Gen. Stat. § 50A-308(a) provides:

A petition under this Part [3] must be verified. Certified copies of all orders sought to be enforced and of any order confirming registration must be attached to the petition. A copy of a certified copy of an order may be attached instead of the original.

Thus, the Hague Convention petition filed by Mannheim DCS was required to be verified.

The text of Mannheim DCS' Hague Convention petition asserts that it is verified, but no verification page is included within the record on appeal. Mannheim DCS has not asserted that a verification was erroneously omitted from the record on appeal, although actually filed. We must, therefore, conclude that the petition was not verified. We agree with respondent father that the failure to verify the petition deprived the trial court of subject matter jurisdiction in this matter.

"Subject matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it." *In re McKinney*, 158 N.C. App. 441, 443, 581 S.E.2d 793, 795 (2003) (quoting *Haker-Volkening v. Haker*, 143 N.C. App. 688, 693, 547 S.E.2d 127, 130, *disc. review denied*, 354 N.C. 217, 554 S.E.2d 338 (2001)). It is "the most critical aspect of the court's authority to act." *Id.* (quoting *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353

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S.E.2d 673, 675 (1987)). Since “a court’s inherent authority does not allow it to act where it would otherwise lack jurisdiction[,]” the question of subject matter jurisdiction must be determined as a threshold matter. *Id.*

In *T.R.P.*, 360 N.C. at 594-95, 636 S.E.2d at 792, the Supreme Court vacated a child custody review order in a neglect proceeding for lack of subject matter jurisdiction because the initial juvenile petition was not verified. The Court explained that the “verification of a juvenile petition is no mere ministerial or procedural act.” *Id.* at 591, 636 S.E.2d at 790. Instead, “verification of the petition in an abuse, neglect, or dependency action as required by N.C.G.S. § 7B-403 is a vital link in the chain of proceedings carefully designed to protect children at risk on one hand while avoiding undue interference with family rights on the other.” *Id.*, 636 S.E.2d at 791.

The Court emphasized that a juvenile abuse, neglect or dependency action “frequently results in DSS’ immediate interference with a respondent’s constitutionally-protected right to parent his or her children.” *Id.* at 591-92, 636 S.E.2d at 791. The Court then concluded:

Therefore, given the magnitude of the interests at stake in juvenile cases and the potentially devastating consequences of any errors, the General Assembly’s requirement of a verified petition is a reasonable method of assuring that our courts exercise their power only when an identifiable government actor “vouches” for the validity of the allegations in such a freighted action.

*Id.* at 592, 636 S.E.2d at 791.

While *T.R.P.* did not involve a Hague Convention petition, the reasoning appears equally applicable to those petitions. We can see no meaningful basis for distinguishing between a juvenile petition and a Hague Convention petition when it comes to the verification requirement. “The Hague Convention provides a *mandatory remedy of return* that is meant both to preserve the status quo with respect to child custody and to deter parents from crossing international boundaries in search of a more sympathetic court.” *Bader*, 445 F.3d at 349 (internal quotation marks omitted) (emphasis added). Because of the mandatory nature of the remedy under the Hague Convention, which entails removing a child from a parent and returning the child to another country, the interests at stake have the same magnitude and the potential consequences of any error would be just as devastating as with a juvenile petition.

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Accordingly, we hold that the failure to verify a petition filed pursuant to the Hague Convention deprives the trial court of subject matter jurisdiction over that petition. Since the petition in this case was not verified, the trial court lacked jurisdiction, and we are required to vacate the order granting relief under the Hague Convention. Because of our decision with respect to the Hague Convention petition, we need not address respondents' remaining arguments regarding that petition.

The trial court entered the order both in the Hague Convention proceeding and the juvenile proceeding. Our holding that the trial court lacked subject matter jurisdiction applies only to the Hague Convention proceeding. The juvenile proceeding initiated by DSS remains pending. While respondent mother makes various arguments on appeal as to why the juvenile proceeding should also have been dismissed, those arguments were the subject of a motion to dismiss filed in the trial court that was not ruled upon. Rule 10(b)(1) of the Rules of Appellate Procedure requires a complaining party to "obtain a ruling upon the party's request, objection, or motion" before this Court can exercise appellate review. As respondents have not yet obtained a ruling on their motion to dismiss the juvenile petition, there is nothing for this Court to review. That motion should be addressed in the first instance by the trial court on remand.

Vacated in part; remanded in part.

Judges McGEE and ROBERT HUNTER, JR. concur.

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STATE OF NORTH CAROLINA v. JAMES DONALD SULLIVAN

No. COA09-705

(Filed 22 December 2009)

**1. Appeal and Error— violation of appellate rules—previous reminders to follow rules**

Although defendant failed to follow a number of the appellate rules including, among others, N.C. R. App. P. 28(b)(5) and (b)(6) despite previous reminders to follow the appellate rules, the Court of Appeals considered his arguments since only the most egregious instances of nonjurisdictional default result in a dismissal.

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**2. Motor Vehicles— operating a motor vehicle—registration and financial responsibility requirements**

The trial court had jurisdiction to find defendant guilty of operating a motor vehicle on a street or highway without the vehicle being registered with the North Carolina Department of Motor Vehicles and operating a motor vehicle on a street or highway without having in full force and effect the financial responsibility required by N.C.G.S. § 20-313.

**3. Appeal and Error— preservation of issues—failure to renew motion to dismiss at close of all evidence**

Although defendant contends the trial court erred by failing to dismiss the charges against defendant based on the State's failure to produce evidence of defendant's willfulness, defendant did not preserve this issue for appellate review under N.C. R. App. P 10(b)(3) because defendant failed to renew his motion at the close of all evidence.

**4. Criminal Law— jury instructions—failure to use requested instruction**

The trial court did not err by failing to use defendant's definition of "willfully" in its instructions to the jury because the court's instruction was consistent with the definition provided by our Supreme Court.

**5. Oaths and Affirmations— trial judge—constitutionality**

The trial court's oath complied with both the United States and North Carolina Constitutions, as well as N.C.G.S. §§ 11-7 and 11-11.

**6. Motor Vehicles— registration and financial responsibility requirements—motion to dismiss charges—vagueness argument**

The trial court did not err by denying defendant's motion to dismiss the charges against him, including failure to register a motor vehicle under N.C.G.S. § 20-111 and failure to comply with the financial responsibility requirements under N.C.G.S. § 20-13, even though defendant contends they were void for vagueness, because defendant failed to demonstrate how these statutes failed to give him the type of fair notice that is necessary to enable him or anyone else operating a motor vehicle to conform their conduct to the law.

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**7. Appeal and Error; Constitutional Law— right to counsel— motion to continue—failure to cite authority—no right to be represented by non-attorney**

Although defendant contends the trial court erred by denying his motion to continue so that he could obtain counsel, defendant abandoned this argument under N.C. R. App. P. 28(b)(6) by failing to cite any authority. Although defendant thereafter requested the trial court to recognize his son, a layman, as counsel, the Court of Appeals has previously rejected the assertion of a right to be represented by a non-attorney.

**8. Appeal and Error— preservation of issues—failure to argue**

The remaining assignment of error that defendant failed to argue was deemed abandoned under N.C. R. App. P. 28(b)(6).

Appeal by defendant from judgment entered 25 February 2009 by Judge Jay D. Hockenbury in Pender County Superior Court. Heard in the Court of Appeals 17 November 2009.

*Attorney General Roy Cooper, by Special Deputy Attorney General Robert C. Montgomery, for the State.*

*James Donald Sullivan, pro se, for defendant-appellant.*

CALABRIA, Judge.

James Donald Sullivan<sup>1</sup> (“defendant”) appeals a judgment entered upon a jury verdict finding him guilty of operating a motor vehicle on a street or highway without the vehicle being registered with the North Carolina Department of Motor Vehicles (“NCDMV”) and operating a motor vehicle on a street or highway without having in full force and effect the financial responsibility required by N.C. Gen. Stat. § 20-313 (2007). We find no error.

### I. Background

On 2 June 2008, Deputy Kevin Malpass (“Deputy Malpass”) of the Pender County Sheriff’s Department initiated a traffic stop of defendant’s vehicle because a valid registration plate was not displayed. As Deputy Malpass attempted to explain to defendant the reason he initiated the traffic stop, defendant pulled out a folder and attempted

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1. James Donald Sullivan is defendant’s full legal name. Defendant has been referred to as “Donald Sullivan” in previous cases before this Court. *See, e.g., Sullivan v. Pender County*, — N.C. App. —, 676 S.E.2d 69 (2009).

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to convince Deputy Malpass that his constitutional rights would be violated if Deputy Malpass issued him a citation. Defendant stated that he had no insurance for the vehicle he was driving, but he showed Deputy Malpass a bank statement which indicated defendant had \$1,514,974.22 in his bank account. Defendant also attempted to convince Deputy Malpass that Sheriff Carson Smith had given defendant permission to travel in Pender County without a valid registration plate.

After checking with his superiors, Deputy Malpass issued defendant a citation for (1) operating a motor vehicle on a street or highway without a proper registration with the NCDMV and (2) operating a motor vehicle on a street or highway without having in full force and effect the financial responsibility required by N.C. Gen. Stat. § 20-313 (2007). On 23 September 2008, after a bench trial, defendant was convicted of both offenses in Pender County District Court. Defendant appealed his conviction to the superior court.

Defendant was tried *de novo* beginning on 24 February 2009 in Pender County Superior Court. On 25 February 2009, the jury returned verdicts of guilty to both of the charges. Defendant was sentenced to forty-five days in the North Carolina Department of Correction. That sentence was suspended and defendant was placed on unsupervised probation for twelve months on the condition that defendant pay a \$750 fine and \$259.50 in court costs. Defendant was also ordered, as special conditions of his probation, to (1) not violate the laws of any state or the federal government; and (2) not operate his vehicle until it was properly registered and had proper financial responsibility. Defendant appeals.

## II. Rules of Appellate Procedure

[1] As an initial matter, we note that defendant has failed to comply with a number of our appellate rules. Defendant's statement of the facts includes argumentative assertions in violation of N.C.R. App. P. 28(b)(5). Additionally, for each of his questions presented, plaintiff has failed to state the appropriate standard of review or cite to specific assignments of error or record pages, in violation of N.C.R. App. P. 28(b)(6). Defendant has previously been reminded to follow the appellate rules, particularly N.C.R. App. P. 28(b). *Sullivan v. Pender County*, — N.C. App. —, —, 676 S.E.2d 69, 71 (2009). While we will consider defendant's arguments because "only in the most egregious instances of nonjurisdictional default will dismissal of [an] appeal be appropriate," *Dogwood Dev. & Mgmt. Co., LLC v. White*

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*Oak Transp. Co.*, 362 N.C. 191, 200, 657 S.E.2d 361, 366 (2008), we again remind defendant that these rules are mandatory and caution him that his continued failure to adhere to these rules subjects him to possible sanctions, including dismissal of his appeal.

III. Jurisdictional Arguments

[2] Defendant argues that the trial court erred by exercising jurisdiction over him. While it is difficult to discern the exact substance of defendant's argument, it appears that, essentially, defendant argues that (1) N.C. Gen. Stat. §§ 20-111(1) & 20-313 (2007) are unconstitutional; (2) the trial court lacked jurisdiction because defendant has no contractual relationship with the State; (3) only federal jurisdiction exists because the State is a party to the instant case; and (4) the trial court lacked jurisdiction because the State of North Carolina cannot prove its lawful creation after the Civil War. We disagree.

A. Constitutionality of N.C. Gen. Stat. §§ 20-111(1) & 20-313

In challenging the constitutionality of a statute, the burden of proof is on the challenger, and the statute must be upheld unless its unconstitutionality clearly, positively, and unmistakably appears beyond a reasonable doubt or it cannot be upheld on any reasonable ground. When examining the constitutional propriety of legislation, [w]e presume that the statutes are constitutional, and resolve all doubts in favor of their constitutionality.

*State v. Mello*, — N.C. App. —, —, — S.E.2d —, — (2009) (internal quotations and citations omitted).

Defendant argues that N.C. Gen. Stat. §§ 20-111(1), which makes it unlawful “[t]o drive a vehicle on a highway, or knowingly permit a vehicle owned by that person to be driven on a highway, when the vehicle is not registered” & 20-313, which forbids operating a motor vehicle “without having in full force and effect the financial responsibility required” are invalid regulations that infringe upon his right to travel.

[T]he right to travel upon the public streets of a city is a part of every individual's liberty, protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and by the Law of the Land Clause, Article I, § 17, of the Constitution of North Carolina. The familiar traffic light is, however, an ever present reminder that this segment of liberty is not absolute. It may be regulated, as to the time and manner of its exercise, when reasonably deemed necessary to the public safety, by laws reasonably adapted to the attainment of that objective.

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*State v. Dobbins*, 277 N.C. 484, 497, 178 S.E.2d 449, 456 (1971). However, the right to travel is not synonymous with the right to operate a motor vehicle on the highways of this State. "The operation of a motor vehicle on such highways is not a natural right. It is a conditional privilege, which may be suspended or revoked under the police power. The license or permit to so operate is not a contract or property right in a constitutional sense." *Honeycutt v. Scheidt*, 254 N.C. 607, 609-10, 119 S.E.2d 777, 780 (1961) (internal quotations and citations omitted).

The Tenth Amendment to the Constitution of the United States provides, "The powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved for the States respectively or to the people." Within this reservation of powers to the individual states, is what has been judicially termed "the police power."

*State v. Whitaker*, 228 N.C. 352, 359, 45 S.E.2d 860, 865 (1947).

[A] State may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles. . . . And to this end it may require the registration of such vehicles and the licensing of their drivers. . . . This is but an exercise of the police power uniformly recognized as belonging to the States and essential to the preservation of the health, safety and comfort of their citizens[.]

*Hendrick v. Maryland*, 235 U.S. 610, 622, 59 L. Ed. 385, 391 (1915).

Defendant's contention that vehicle registration and financial responsibility requirements are not valid exercises of this State's police power because they do not bear any relationship to public safety is meritless. There are ample public safety justifications for both requirements.

The reason assigned for the necessity of registration and licensing is that the vehicle should be readily identified in order to debar operators from violating the law and the rights of others, and to enforce the laws regulating the speed, and to hold the operator responsible in cases of accident. The Legislatures have deemed that the best method of identification, both as to the vehicle and the owner or operator, is by a number or a tag conspicuously attached to the vehicle. In case of any violation of law this furnishes means of identification, for, from the number, the

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name of the owner may be readily ascertained and through him the operator. Such acts . . . have for their object the protection of the public.

*Parke v. Franciscus*, 228 P. 435, 439 (Cal. 1924) (quotation and citation omitted). Similarly, the purpose of financial responsibility requirements “is to protect the public on the highways against the operation of motor vehicles by reckless and irresponsible persons, a duty which is inherent in every sovereign government and is a proper exercise of police power.” *Doyle v. Kahl*, 46 N.W.2d 52, 55 (Iowa 1951) (citations omitted).

We hold that N.C. Gen. Stat. §§ 20-111(1) & 20-313 “bear[] a real and substantial relationship to public safety. The General Assembly, therefore, had ample authority, under its police power, to enact the section[s] of the statute here challenged and to make [their] violation a criminal offense.” *State v. Anderson*, 275 N.C. 168, 171, 166 S.E.2d 49, 51 (1969). If defendant does not wish to follow these statutory requirements, we remind him that he may exercise his right to travel in a variety of other ways. “If he wishes, he may walk, ride a bicycle or horse, or travel as a passenger in an automobile, bus, airplane or helicopter. He cannot, however, operate a motor vehicle on the public highways. . . .” *State v. Davis*, 745 S.W.2d 249, 253 (Mo. Ct. App. 1988). This assignment of error is overruled.

B. The State as a Party

Defendant argues that the trial court lacked jurisdiction because the State is a party in the instant case. Defendant contends that U.S. Const. art. III requires that any case in which the State is a party, including criminal proceedings, must be brought in federal court. This Court has previously rejected this argument. *See State v. Phillips*, 149 N.C. App. 310, 315, 560 S.E.2d 852, 855 (2002) (“Article III, Section 2, Clause 1 does not confer jurisdiction over criminal matters brought by a state against its own citizen for a crime occurring in that state.”); *see also Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 446, 89 L. Ed. 1051, 1056 (1945) (“The original jurisdiction is confined to civil suits where damage has been inflicted or is threatened, not to the enforcement of penal statutes of a State.”). This assignment of error is overruled.

C. Remaining Jurisdictional Arguments

In his remaining jurisdictional claims, defendant fails to cite any legal authority that supports his arguments that the trial court lacked

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jurisdiction because defendant has no contractual relationship with the State and because the State of North Carolina cannot prove its lawful creation after the Civil War. While defendant purports to have added “authority” to these arguments in his Reply Brief, these additional arguments do not actually contain any legal authority. Consistent with our appellate rules, “[defendant]’s patently frivolous assertions raised on appeal in a rambling narrative, unsupported by any authority will not be considered on appeal.” *Redden v. State*, 739 P.2d 536, 538 (Okla. Crim. App. 1987); *see also* N.C.R. App. P. 28(b)(6) (2008) (“Assignments of error . . . in support of which no reason or argument is stated or authority cited, will be taken as abandoned.”). These assignments of error are dismissed.

III. WillfulnessA. Motion to dismiss

[3] Defendant argues that the trial court erred by failing to dismiss the charges against him because the State failed to produce evidence of defendant’s willfulness. Defendant made a motion to dismiss at the close of the State’s evidence, but failed to renew his motion at the close of all the evidence. Therefore, he has failed to preserve this question for appellate review. *See* N.C.R. App. 10(b)(3) (2008) (“[I]f a defendant fails to move to dismiss the action . . . at the close of all the evidence, he may not challenge on appeal the sufficiency of the evidence to prove the crime charged.”).

B. Jury instructions

[4] Defendant argues that the trial court erred by failing to use defendant’s definition of “willfully” in its instructions to the jury. Defendant contends that the trial court should have instructed the jury that “a willful act is one that is done knowingly and purposely with the direct object of injuring another.” We disagree.

“It is fundamental that the purpose of the jury charge is to provide clear instructions regarding how the law should be applied to the evidence, in such a manner as to assist the jury in understanding the case and in reaching a verdict.” *State v. Wardrett*, 145 N.C. App. 409, 417, 551 S.E.2d 214, 220 (2001) (citation omitted). “Where the instructions to the jury, taken as a whole, present the law fairly and clearly to the jury, we will not find error even if isolated expressions, standing alone, might be considered erroneous.” *State v. Morgan*, 359 N.C. 131, 165, 604 S.E.2d 886, 907 (2004) (citations omitted).

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Defendant's proposed definition of a willful act comes from *Hazle v. Southern Pac. Co.*, 173 F. 431, 432 (1909). *Hazle* was a negligence action and the *Hazle* Court was defining willful in the context of a "willful and wanton injury." *Id.* This definition does not apply in a criminal action, such as the instant case.

The other case cited by defendant, *State v. Young*, is also not applicable to the instant case. In *Young*, the defendant, a registered sex offender who had been adjudicated incompetent, was charged with failing to notify the sheriff's department of a change of address. 140 N.C. App. 1, 4, 535 S.E.2d 380, 381 (2000). This Court held that special notification requirements were necessary because of the defendant's incompetence. *Id.* at 11-14, 535 S.E.2d at 386-88. *Young* did not disturb the general rule that "ignorance of the law will not excuse" a defendant who "either knew or should have known of the possible violation." *Id.* at 11-12, 535 S.E.2d at 386.

In the instant case, the trial court instructed the jury that "[t]he word willfully means something more than an intention to commit the offense. It implies committing the offense purposely and designedly in violation of law." This instruction is consistent with the definition of "willfully" provided by our Supreme Court. *See State v. Stephenson*, 218 N.C. 258, 264, 10 S.E.2d 819, 823 (1940). This assignment of error is overruled.

#### IV. Trial Court's Oath

[5] Defendant argues that the trial court erred in presiding over defendant's trial because the trial court lacked a "constitutional oath" on file with the clerk of court. Defendant's argument, which cites no legal authority other than the oath in question, is without merit. After reviewing the trial court's oath, we find that it complies with both the United States and North Carolina constitutions, as well as N.C. Gen. Stat. §§ 11-7 & 11-11 (2007). This assignment of error is overruled.

#### V. Vagueness

[6] Defendant argues that the trial court erred in denying his motion to dismiss the charges against him because the statutes at issue were void for vagueness. We disagree.

A statute is "void for vagueness" if it forbids or requires doing an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. When evaluating whether a person of ordinary intelligence could determine what conduct is prohibited, [o]nly a reasonable degree of

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certainty is necessary, mathematical precision is not required. The purpose of this fair notice requirement is to enable a citizen to conform his or her conduct to the law.

*State v. Mello*, — N.C. App. —, —, — S.E.2d —, — (2009) (internal quotations and citations omitted).

Defendant was convicted of failure to register under N.C. Gen. Stat. § 20-111, which states:

It shall be unlawful for any person to commit any of the following acts:

- (1) To drive a vehicle on a highway, or knowingly permit a vehicle owned by that person to be driven on a highway, when the vehicle is not registered with the Division in accordance with this Article or does not display a current registration plate.

N.C. Gen. Stat. § 20-111 (2007).

Defendant was also convicted under N.C. Gen. Stat. § 20-313, which states:

- (a) On or after July 1, 1963, any owner of a motor vehicle registered or required to be registered in this State who shall operate or permit such motor vehicle to be operated in this State without having in full force and effect the financial responsibility required by this Article shall be guilty of a Class 1 misdemeanor.

N.C. Gen. Stat. § 20-313 (2007). The methods of demonstrating financial responsibility are contained in N.C. Gen. Stat. § 20-309(b): “Financial responsibility shall be a liability insurance policy or a financial security bond or a financial security deposit or by qualification as a self-insurer, as these terms are defined and described in Article 9A, Chapter 20 of the General Statutes of North Carolina, as amended.” N.C. Gen. Stat. § 20-309(b) (2007).

The purpose of the statutes at issue is very clear. There is nothing in these statutes that “forbids or requires doing an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.” *Mello*, — N.C. App. at —, — S.E.2d at —. Defendant has failed to demonstrate how these statutes failed to give him the type of fair notice that is necessary to enable him or anyone else operating a motor vehicle to conform their conduct to the law. This assignment of error is overruled.

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**VI. Right to Counsel**

**[7]** Defendant argues that the trial court erred by denying his motion to continue so that he could obtain counsel and by denying defendant the right to counsel from defendant's son, an unlicensed layman. Defendant cites no authority for his argument regarding his motion to continue and it is therefore deemed abandoned. *See* N.C.R. App. P. 28(b)(6) (2008). We disagree with defendant's remaining contention.

After defendant's motion to continue was denied, he requested that the trial court recognize his son, a layman, as "counsel to sit here and provide me aid and counsel during the trial." The trial court denied this request. Defendant argues that this decision deprived him of his Sixth Amendment right to counsel of his choice. The assertion of a "right" to be represented by a non-attorney has previously been rejected by this Court. *State v. Phillips*, 152 N.C. App. 679, 683, 568 S.E.2d 300, 303 (2002). This assignment of error is overruled.

**[8]** Defendant has failed to bring forth any argument regarding his remaining assignment of error. As such, we deem this assignment of error abandoned pursuant to N.C.R. App. P. 28(b)(6) (2008). We hold that "defendant, in spite of his own efforts, received a fair trial free from prejudicial error. . . ." *Phillips*, 152 N.C. App. at 687, 568 S.E.2d at 305.

No error.

Judges WYNN and BEASLEY concur.

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EDGAR BARNES KEITH, JR., CO-TRUSTEE OF THE LYNN REGNERY TRUST "B", PETITIONER  
v. GRETCHEN WALLERICH, CO-TRUSTEE OF THE LYNN REGNERY TRUST "B"; LYNN  
REGNERY, BENEFICIARY; SETH ANDERSON; AND JOHN WILLIAM REGNERY,  
RESPONDENTS

No. COA08-1444

(Filed 22 December 2009)

**1. Jurisdiction— subject matter—trust pursuit claim**

The superior court had subject matter jurisdiction to hear a trust pursuit claim where the clerk of superior court had original jurisdiction over the claim and had statutory authority to transfer the claim to the superior court. The clerk of superior court had

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original jurisdiction over the claim as it concerned the internal affairs of a trust.

**2. Jurisdiction— concurrent—superior and district court— prior valid order binding**

The superior court erred in a trust pursuit claim by ordering the transfer of assets from a limited liability corporation to a trust where there was a prior valid order entered in an equitable distribution proceeding in the district court which prohibited such transfers.

**3. Parties— subject of order not a party**

The trial court erred in a trust pursuit claim by ordering the transfer of assets from a limited liability corporation (LLC) to a trust where the LLC was not a party to the proceedings. This constituted a separate basis for vacating the judgment of the superior court.

Appeal by petitioner from judgment filed 20 June 2008 by Judge John E. Nobles, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 20 April 2009.

*Culbreth Law Firm, LLP, by Stephen E. Culbreth, for petitioner-appellant.*

*Marshall, Williams & Gorham, LLP, by Lonnie B. Williams, for respondents-appellees.*

STEELMAN, Judge.

The superior court was required to give full effect to the prior valid and binding order of the district court. The superior court could not order the transfer of real property when the record owner was not a party to the proceeding.

**I. Factual and Procedural Background**

Pursuant to a will dated 11 August 1955, Frederick L. Regnery provided for the creation of a trust upon his death. On 2 February 1966, the will and trust provisions were modified by a codicil. Upon his death in 1980, a trust was created, which was later divided into three separate trusts. This appeal concerns only one of the three trusts: The Lynn Regnery Trust “B” (Trust B). Lynn Regnery (Regnery) is the sole lifetime beneficiary of Trust B, and after her death, John William Regnery (John) and his siblings are the residual beneficiaries.

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On 3 June 1994, Regnery married Edgar Barnes Keith, Jr. (Keith). On 27 September 1996, Keith was appointed co-trustee of Trust B, with Gretchen Wallerich (Wallerich) acting as co-trustee. During their marriage, Regnery-Keith, LLC (LLC) was formed. Regnery asserts that she was the sole Member-Manager of the LLC, and Keith asserts that both he and Regnery were Member-Managers. The LLC purchased five rental properties with funds loaned from Trust B. In July 2007, one of the properties was sold, and the money received from the sale was paid to the trust.

On 31 December 2007, Regnery and Keith separated, and on 6 January 2008, Regnery sent Keith an email, requesting: "Please resign as trustee from Trust B. [Wallerich] is going to send you a letter to sign." On 9 January 2008, John sent Seth S. Andersen (Andersen) an email asking Andersen to become co-trustee on Trust B, replacing Keith. On 10 January 2008, a document was sent to Keith requesting that he immediately resign as co-trustee.

On 25 January 2008, Regnery filed a document changing the name of the LLC to Regnery, LLC with Regnery listed as the sole agent. Regnery executed a quitclaim deed transferring the rental houses owned by Regnery-Keith, LLC to Regnery, LLC. On 29 January 2008, Regnery filed a complaint in New Hanover County District Court for divorce from bed and board and sequestration of the marital residence (the domestic action). On 8 February 2008, Regnery filed an amended complaint in the district court adding a claim for equitable distribution of marital property. Regnery, as Trustee of another trust, and Regnery, LLC were joined as third-party defendants in the domestic action.

On 3 March 2008, the district court entered a Preliminary Injunction and Order Sequestering Real Property, by and with the consent of the parties. The order identified the four remaining rental properties owned by the LLC, "the marital or separate nature of which are in dispute: (a) 7255 Copperfield Drive, currently not rented; (b) 7263 Copperfield Drive, currently rented per month; (c) 601 Brookbend Drive, currently rented per month; and (d) 622 Brookbend Drive, currently occupied by [Keith]." The order sequestered the marital home for the benefit of Regnery and the rental property occupied by Keith for his benefit, all pending further orders of the court. It ordered: "The Plaintiff, Defendant and the Third Party Defendants are hereby restrained and enjoined from disposing of, wasting, spending or otherwise putting any of the property

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set forth above out of the reach of the court pending final hearings in this matter.”

On 3 March 2008, prior to the filing of the Preliminary Injunction, Keith filed a document in New Hanover County Superior Court styled as “Petition as to Trust Pursuant to Article 2 of Chapter 36C of the North Carolina General Statutes” asserting the following claims: (1) that he be allowed to resign as trustee of Trust B; (2) that the appointment of Andersen be declared invalid and a new trustee appointed; (3) that transfers from the trust by John be declared invalid; (4) that the court assume control of the trust assets and require an accounting from Wallerich; (5) that Keith be compensated for his services as trustee; and (6) for costs and attorney’s fees. On 28 April 2008, Regnery, Wallerich, Andersen and John (collectively respondents) filed a Response and Cross-Petition in superior court asserting claims against Keith for: (1) removal as trustee for breach of fiduciary duty; (2) removal as trustee for conflict of interest; (3) an accounting and transfer of assets to the remaining trustee; and (4) trust pursuit.

In their trust pursuit claim, respondents contended that Keith, as trustee, wrongfully loaned trust funds to the LLC and that the assets of the LLC (consisting of four rental houses) are in fact assets of Trust B and not property of the LLC.

On 12 May 2008, respondents filed a Motion for Partial Summary Judgment for the removal of Keith as co-trustee and requesting an order directing Keith to restore \$50,000 removed from Trust B. On 23 May 2008, Keith filed motions to dismiss the claims set forth in the Cross-Petition. As to the third and fourth claims in the Cross-Petition, he asserted that jurisdiction over these claims lay with the district court in the domestic action, and that the clerk had no jurisdiction to hear these claims.

On 30 May 2008, the clerk of superior court entered an order accepting Keith’s resignation as co-trustee, appointing a special fiduciary, directing that monies of Trust B at Cape Fear Bank be transferred to the clerk of superior court, and transferring the remaining claims, motions and issues to the superior court for resolution.

On 9 June 2008, this matter came on for hearing in superior court. On 10 June 2008, Keith withdrew his motion to remove Wallerich as co-trustee; his motion for an accounting by John; his motion to dismiss for failure to join other beneficiaries; the portion of his claim seeking to declare Andersen’s appointment as co-trustee invalid; and the claim seeking compensation for his services to the trust.

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On 20 June 2008, the trial court entered a judgment holding that it had jurisdiction over respondents' claim for trust pursuit; that the assets of the LLC were assets of Trust B under the theory of trust pursuit; and that the balance of respondents' claims were moot.

Keith appeals.

**II. Subject Matter Jurisdiction****A. Standard of Review**

The standard of review for lack of subject matter jurisdiction is *de novo*. *Country Club of Johnston Cty., Inc. v. U. S. Fidelity & Guar. Co.*, 150 N.C. App. 231, 238, 563 S.E.2d 269, 274 (2002) (citing *Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001)). In determining whether subject matter jurisdiction exists, a court may consider matters outside of the pleadings. *Tart v. Walker*, 38 N.C. App. 500, 502, 248 S.E.2d 736, 737 (1978).

**B. Trust Pursuit Claim**

[1] In his first argument, Keith contends that the trial court lacked subject matter jurisdiction to hear a trust pursuit claim when the trial court's jurisdiction was derived from the clerk of superior court under Chapter 36C, Article 2 of the North Carolina General Statutes. We disagree.

N.C. Gen. Stat. § 36C-2-203 provides:

(a) The clerks of superior court of this State have original jurisdiction over all proceedings concerning the internal affairs of trusts. Except as provided in subdivision (9) of this subsection, the clerk of superior court's jurisdiction is exclusive. Proceedings concerning the internal affairs of the trust are those concerning the administration and distribution of trusts, the declaration of rights, and the determination of other matters involving trustees and trust beneficiaries, to the extent that those matters are not otherwise provided for in the governing instrument.

N.C. Gen. Stat. § 36C-2-203(a) (2007)<sup>1</sup>. The clerk's original jurisdiction is limited to the internal affairs of the trust. The statute then lists nine proceedings, which deal with the internal affairs of a trust:

To ascertain beneficiaries, to determine any question arising in the administration or distribution of any trust, including ques-

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1. The 2009 Session Laws modified section (a)(9) of this statute; effective 1 October 2009, and are not applicable to this case. *See* 2009 N.C. Sess. Laws ch. 267, sec. 1 (2009).

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tions of construction of trust instruments, and to determine the existence or nonexistence of trusts created other than by will and the existence or nonexistence of any immunity, power, privilege, duty, or right. Any party may file a notice of transfer of a proceeding pursuant to this subdivision to the superior court division of the General Court of Justice as provided in G.S. 36C-2-205(g1). In the absence of a transfer to Superior Court, Article 26 of Chapter 1 of the General Statutes shall apply to a trust proceeding pending before the clerk of superior court to the extent consistent with this Article.

N.C. Gen. Stat. § 36C-2-203(a)(9) (2007).<sup>2</sup> Keith contends that this does not include the declaratory relief sought by respondents in their trust pursuit claim.

An examination of Chapter 36C does not reveal any relevant definition of “administration.” In interpreting the words of a statute, we rely on their plain meaning “absent a definition or contextual cue to the contrary.” *Wells v. Consolidated Jud’l Ret. Sys. of N. C.*, 136 N.C. App. 671, 675, 526 S.E.2d 486, 490 (2000) (citing *Abernethy v. Commissioners*, 169 N.C. 631, 86 S.E. 577 (1915)), *aff’d*, 354 N.C. 313, 553 S.E.2d 877 (2001). In applying this principle, we observe that “administration” is understood to mean “a judicial action in which a court undertakes the management and distribution of property.” Black’s Law Dictionary 49 (9th ed. 2009).

The doctrine of trust pursuit rests on the equitable principles that:

[W]henever the legal title to property, real or personal, has been obtained through actual fraud, . . . or under any other similar circumstances, which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity imposes a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein; and a court of equity has jurisdiction to reach the property either in the hands of the original wrong-doer, or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right, and takes the property relieved from the trust.

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2. The 2009 Session Laws modified section (a)(9) of this statute; effective 1 October 2009, and are not applicable to this case. *See* 2009 N.C. Sess. Laws ch. 267, sec. 1 (2009).

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*Trust Co. v. Barrett*, 238 N.C. 579, 586, 78 S.E.2d 730, 735 (1953) (internal quotations and citations omitted). The doctrine of trust pursuit allows property impressed with a trust to “be followed through all changes in its state and form, so long as such property or its proceeds or its products are capable of identification.” *Id.* at 585, 78 S.E.2d at 735 (citations omitted). This general rule has evolved that, “the act of a trustee in mingling trust funds in a mixed bank account will not destroy their identity so as to prevent their reclamation.” *Bank v. Mobile Homes Sales*, 26 N.C. App. 690, 694, 217 S.E.2d 108, 111 (1975) (citations omitted). The doctrine of trust pursuit deals with the management and distribution of trust property. We hold that this doctrine is reasonably related to the administration of the trust because it allows a court to follow the wrongful distribution of trust property in order to reclaim that property from the hands of a wrongdoer. The doctrine of trust pursuit falls within the ambit of N.C. Gen. Stat. § 36C-2-203(a)(9).

Six limitations to the clerk’s jurisdiction are set out in N.C. Gen. Stat. § 36C-2-203(f). None of these are applicable in the instant case. *See* N.C. Gen. Stat. § 36C-2-203(f) (2007)<sup>3</sup>. After her order, the clerk forwarded the remaining claims, including the trust pursuit claim, to the superior court for resolution. The clerk of superior court, by statute, has the authority to transfer proceedings to the appropriate court “when an issue of fact, an equitable defense, or a request for equitable relief is raised in a pleading in a special proceeding or in a pleading or written motion in an adoption proceeding.” N.C. Gen. Stat. § 1-301.2(b) (2007)<sup>4</sup>.

Remedies are divided into “actions” and “special proceedings.” N.C. Gen. Stat. § 1-1 (2007). “Actions” are defined as ordinary proceedings “in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment or prevention of a public offense.” N.C. Gen. Stat. § 1-2 (2007). “Special proceedings” are defined as “[e]very other remedy.” N.C. Gen. Stat. § 1-3 (2007). Any proceedings, prior to the Code of Civil Procedure, that might have been commenced by petition or by motion on notice such as proceedings for dower and partition are special proceedings. *See Tate v. Powe*, 64 N.C. 644 (1870). In the instant case, this proceeding

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3. The 2009 Session Laws modify section (f) of this statute. These modifications took effect 1 October 2009. *See* 2009 N.C. Sess. Laws ch. 318, sec. 2 (2009).

4. The 2009 Session Laws modify section (e) of this statute. These modifications took effect 1 October 2009. *See* 2009 N.C. Sess. Laws ch. 362, sec. 5 (2009).

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was commenced by Keith when he filed a document styled as “Petition as to Trust Pursuant to Article 2 of Chapter 36C of the North Carolina General Statutes” on 3 March 2008. One of his asserted claims was that he be allowed to resign as trustee of Trust B. A proceeding by a trustee for the purpose of resigning his trust is denominated a special proceeding. *Russ v. Woodard*, 232 N.C. 36, 40, 59 S.E.2d 351, 354 (1950).

A claim for trust pursuit is an equitable claim, and because it was raised in a special proceeding, it was proper for the clerk to transfer the claim to superior court. Once the claims were properly before the superior court, the judge could “hear and determine all matters in controversy.” N.C. Gen. Stat. § 1-301.2(c) (2007).

This argument is without merit.

**III. District Court Order**

**[2]** In his second argument, Keith contends that the trial court erred by ordering Regnery to transfer the assets of the LLC to Trust B when there was a prior valid and binding order in the district court prohibiting such transfers. We agree.

We first note that both parties have attempted to use the proceedings before the clerk of court and the superior court to improve their position in the equitable distribution proceeding before the district court. This is an improper use of our courts, and has only served to delay the completion of the district court proceedings and to cause needless cost and effort to both parties.

“Except in respect of proceedings in probate and the administration of decedents’ estates, the original civil jurisdiction so vested in the trial divisions is vested concurrently” in the superior court division and the district court division. N.C. Gen. Stat. § 7A-240 (2007). However, a superior court is required to give full effect to a previously filed district court order. See *Wyatt v. Wyatt*, 69 N.C. App. 747, 318 S.E.2d 251, *disc. review denied*, 312 N.C. 498, 322 S.E.2d 566 (1984).

The district court consent order specifically listed four properties titled to the LLC and sequestered one of the properties for Keith’s use and benefit. The parties were then enjoined from “disposing of, wasting, spending or otherwise putting any of the property set forth above out of the reach of the court pending final hearings in this matter.” The order was filed on 3 March 2008. On 28 April 2008, Regnery filed

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a cross-petition with the Clerk of Court of New Hanover County asserting her claim for trust pursuit, which specifically sought to have title of the four tracts of real estate transferred from the LLC to Trust B.

This claim, brought initially before the clerk of court and subsequently before the superior court, sought to do what Regnery had specifically agreed not to do; transfer title to the four tracts of real estate during the pendency of the equitable distribution action in district court. The judgment of the superior court, on 20 June 2008, which ordered the transfer of title of the four tracts of real estate, was in direct contravention of the injunction previously entered by the district court. The judgment of the superior court is vacated, and this matter is remanded to the superior court for entry of an order directing that title to the four parcels of real estate be re-conveyed by Trust B to the LLC. We note that the corporate entity of the LLC is the same, whether it is called Regnery-Keith, LLC or Regnery LLC.

IV. LLC Not A Party to the Superior Court Action

**[3]** In his next argument, Keith contends that the trial court improperly ordered Regnery to transfer the assets of the LLC to Trust B when the LLC was never made a party to the proceeding. We agree.

The superior court ordered Regnery to transfer the assets of the LLC to Trust B. The LLC, a limited liability corporation, and not Regnery, was the record owner of the four tracts of real estate. However, the LLC was not a party to the proceedings before the clerk of court or the superior court.

By ordering Regnery to convey the assets of the LLC to Trust B, the trial court totally ignored that the LLC was a legal entity, recognized under Chapter 57C of the General Statutes. The courts are not free, for the sake of convenience, to completely ignore the existence of a legal entity, such as the LLC. *See* N.C. Gen. Stat. § 57C-2-02 (2007). The trial court exceeded its authority when it ordered Regnery to transfer the assets of the LLC to Trust B. This constitutes a separate and independent basis for vacating the judgment of the trial court and ordering the re-conveyance of the four tracts of real estate to the LLC.

The trial court shall hold Regnery's trust pursuit claim in abeyance pending resolution of the equitable distribution matter in district court.

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Because we have vacated the judgment of the superior court, it is not necessary that we address appellant's remaining assignments of error.

VACATED and REMANDED.

Chief Judge MARTIN and Judge CALABRIA concur.

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SUSAN BOYKIN, ADMINISTRATRIX OF THE ESTATE OF CLAUDIA FAISON, PLAINTIFF v. WILSON MEDICAL CENTER, WILSON EMERGENCY GROUP, P.A., AND JOHN KILLGORE, DEFENDANTS

No. COA09-450

(Filed 22 December 2009)

**Civil Procedure— new trial—invited error doctrine—rigorous trial schedule**

The trial court did not abuse its discretion in a medical malpractice case by granting plaintiff's motion for a new trial. The doctrine of invited error was inapplicable since plaintiff did nothing to induce the trial court to impose such a rigorous schedule, and the decision of whether the rigorous trial schedule compromised justice rested with the presiding trial judge who was able to personally observe the effects of the trial schedule upon the jurors.

Appeal by Defendants from order entered 6 October 2008 by Judge Milton F. Fitch, Jr. in Wilson County Superior Court. Heard in the Court of Appeals 14 October 2009.

*Ferguson, Stein, Chambers, Gresham & Sumter, P.A., by Adam Stein, for plaintiff-appellee.*

*Smith Moore Leatherwood LLP, by Sidney S. Eagles, Jr., Elizabeth Brooks Scherer, Matthew Nis Leerberg; and Teague Campbell Dennis & Gorham, LLP, by Carrie E. Meigs and Courtney S. Britt, for defendant-appellant Wilson Medical Center.*

*John Killgore, pro se defendant-appellant.*

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STEELMAN, Judge.

Where the trial court granted Plaintiff's motion for a new trial pursuant to Rule 59(a)(9) of the North Carolina Rules of Civil Procedure based upon juror and counsel fatigue, we discern no abuse of discretion. The failure of Plaintiff to object to the trial court's schedule did not prohibit the trial court from considering the schedule in determining whether a new trial should be awarded under Rule 59(a)(9). Where the trial court unilaterally imposed a harsh trial schedule upon the parties, the concept of invited error is not applicable.

I. Procedural Background

On 11 August 2006, Susan F. Boykin, Administratrix of the Estate of Claudia Faison (Plaintiff) filed a complaint against Wilson Medical Center, Wilson Medical Group, P.A., and John E. Killgore (Defendants) seeking monetary damages based upon the alleged negligence of Defendants as health care providers. This case was calendared for trial at the 30 June 2008 session of civil superior court for Wilson County. At the call of the calendar, counsel for the parties advised the trial court that the trial of the case would take at least seven days. Friday of that week was the 4th of July holiday. The presiding judge announced that he was going to attempt to finish the trial before the 4th of July.

Jury selection began on Monday, 30 June, and the jury was empaneled at 6:00 p.m. Court was adjourned at 7:15 p.m., and the trial resumed at 9:30 a.m. on Tuesday morning. At 9:25 p.m. on Tuesday, court was adjourned, and the trial resumed at 9:30 a.m. Wednesday morning. At 9:40 p.m. on Wednesday, court was adjourned, and the trial resumed at 9:30 a.m. Thursday morning. The jury left the courtroom to deliberate just after 10:00 p.m., and returned with a verdict at 10:45 p.m. The jury determined that Defendants were not negligent in causing injuries to Claudia Faison. On 21 July 2008, a judgment in favor of Defendants was filed.

On 1 August 2008, Plaintiff filed a motion for a new trial pursuant to Rule 59(a)(9) of the North Carolina Rules of Civil Procedure. The basis for the motion was the "marathon trial schedule" imposed by the trial court and its impact upon jurors and lawyers. On 6 October 2008, the trial court filed an order granting Plaintiff's motion for a new trial. Defendants appeal.

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II. Standard of Review

“It has been long settled in our jurisdiction that an appellate court’s review of a trial judge’s discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge.” *Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982) (citations omitted).

III. North Carolina Rule of Civil Procedure 59(a)(9)

N.C. Gen. Stat. § 1A-1, Rule 59 provides, in part:

Rule 59. New trials; amendment of judgments.

(a) Grounds.—A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds:

....

(9) Any other reason heretofore recognized as grounds for new trial.

N.C. Gen. Stat. § 1A-1, Rule 59(a)(9) (2007). “This provision recognizes the traditional and inherent discretionary power of the court to order a new trial when the ends of justice will be served . . . .” 2 G. Gray Wilson, *North Carolina Civil Procedure* § 59-12, at 59-23 (3d ed. 2007) (citing *Sizemore v. Raxter*, 58 N.C. App. 236, 293 S.E.2d 294 (1982)). This provision also permits the trial court to order a new trial where “a palpable miscarriage of justice would result[.]” *Bundy v. Sutton*, 207 N.C. 422, 427, 177 S.E. 420, 422 (1934); where justice and equity so require, *Walston v. Greene*, 246 N.C. 617, 617, 99 S.E.2d 805, 806 (1957); or when it would work an injustice to let the verdict stand, *Selph v. Selph*, 267 N.C. 635, 637, 148 S.E.2d 574, 575-76 (1966).

The power vested in the trial courts pursuant to this provision are very broad indeed, and should be exercised carefully and reluctantly. *In re Buck*, 350 N.C. 621, 626, 516 S.E.2d 858, 861 (1999). “This is so because the exercise of this discretion sets aside a jury verdict and, therefore, will always have some tendency to diminish the fundamental right to trial by jury in civil cases which is guaranteed by our Constitution.” *Id.*

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**IV. Judge Fitch's Order**

The order granting Plaintiff's motion for a new trial contained the following findings of fact:

7. By the time the jury began its deliberations, the jurors had already been in court for approximately 46 hours over four days: from 10 a.m. until 7:30 p.m. on Monday (9.5 hours); from 9:30 a.m. until 9:30 p.m. on Tuesday (12 hours); from 9:30 a.m. until 9:30 p.m. on Wednesday (12 hours); and already from 9:30 a.m. until 10:00 p.m. on Thursday (12.5 hours) and with the work of deliberations still ahead of them.

....

9. The Court concludes, in retrospect, that by the time the case was coming to an end with the closing arguments, the Court's instructions, and jury deliberations, the jurors were so exhausted that their ability to give proper attention and consideration to the case was significantly compromised.

....

11. Furthermore, and in retrospect, the choice the Court put to the tired jurors whether to begin deliberations and finish up that night or to return on the Fourth of July put a burden on them to depart from a process of calm, fair, and unhurried deliberation to which the parties were entitled. Instead, the choice very likely pushed the jurors to a hurried verdict driven by a desire to finish with the case so that they could enjoy the three day Fourth of July weekend.

The order specifically stated that it was entered pursuant to Rule 59(a)(9) of the Rules of Civil Procedure and referenced the "discretionary power of the court to order a new trial when the ends of justice will be served and when justice and equity so require."

**V. Invited Error**

In their first argument, Defendants contend that the trial court erred in granting Plaintiff's motion for a new trial because Plaintiff failed to object to the trial schedule as proposed by the trial court at the commencement of the trial. We disagree.

Defendants argue the failure of Plaintiff to object created "invited error" and waived any right to seek a new trial based upon the trial schedule and its resulting consequences.

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Invited error has been defined as

“a legal error that is not a cause for complaint because the error occurred through the fault of the party now complaining.” The evidentiary scholars have provided similar definitions; e.g., “the party who induces an error can’t take advantage of it on appeal”, or more colloquially, “you can’t complain about a result you caused.”

21 Charles Alan Wright and Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5039.2, at 841 (2d ed. 2005) (footnotes omitted); see also *Frugard v. Pritchard*, 338 N.C. 508, 512, 450 S.E.2d 744, 746 (1994) (“A party may not complain of action which he induced.” (citations omitted)).

Defendants acknowledge that this Court held in the case of *Guox v. Satterly* that the failure of the plaintiff to object to testimony at trial did not preclude the trial court from considering that testimony upon a motion for a new trial under Rule 59(a)(6) (excessive or inadequate damages appearing to have been given under the influence of passion or prejudice). 164 N.C. App. 578, 582, 596 S.E.2d 452, 455, *disc. review denied*, 359 N.C. 188, 606 S.E.2d 906 (2004). However, Defendants contend *Guox* is distinguishable because it did not involve invited error and because the prejudicial evidence in *Guox* was introduced by the party who was not moving for a new trial. Defendants assert that they are blameless for the consequences arising out of the rigorous schedule imposed by the trial court.

It is clear from the record that all counsel advised the court that the case would take seven days of trial to complete. The trial court made the decision to shoehorn the case into three and a half days. None of the parties objected, and all parties worked diligently to comply with the trial court’s desired schedule. Where the trial court unilaterally imposed a rigorous trial schedule without any encouragement from the parties, any error in that schedule cannot be said to have “occurred through the fault of the party now complaining.” 21 Charles Alan Wright and Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5039.2, at 841. Plaintiff did nothing to induce the trial court to impose such a rigorous schedule. Therefore, the doctrine of invited error is inapplicable.

Under Rule 59(a)(9) the question presented is whether there was “a palpable miscarriage of justice” such that the jury verdict should not be allowed to stand. This inquiry goes to the fundamental fairness and justice of the trial and the verdict. As in *Guox*, the trial judge is

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not limited in its consideration of these matters by whether or not a party objected to evidence, or in this case, the trial schedule. This argument is without merit.

VI. Abuse of Discretion

In their second argument, Defendants contend that the trial court abused its discretion in determining that Plaintiff was prejudiced by the trial schedule. We disagree.

Defendants renew their arguments that Plaintiff's failure to object constituted invited error. They further assert that whatever prejudice resulted from the trial court's rigorous schedule was borne equally by all parties and their counsel, and not exclusively by Plaintiff.

As noted above, the decision on whether or not to grant a new trial pursuant to Rule 59(a)(9) rests in the sound discretion of the trial judge. Our Supreme Court has characterized this discretion as being "practically unlimited." *Settee v. Electric Ry.*, 170 N.C. 365, 367, 86 S.E. 1050, 1051 (1915).

We believe that our appellate courts should place great faith and confidence in the ability of our trial judges to make the right decision, fairly and without partiality, regarding the necessity for a new trial. Due to their active participation in the trial, their first-hand acquaintance with the evidence presented, their observations of the parties, the witnesses, the jurors and the attorneys involved, and their knowledge of various other attendant circumstances, presiding judges have the superior advantage in best determining what justice requires in a certain case.

*Worthington*, 305 N.C. at 487, 290 S.E.2d at 605.

Judge Fitch was in a far better position to determine whether his ill-advised trial schedule resulted in "a palpable miscarriage of justice" than can we based upon a cold record. The trial court was able to personally observe the level of fatigue in the attorneys and jurors, and to gauge the level of attentiveness of the jurors. These things clearly weighed heavily in Judge Fitch's decision to grant a new trial, but are intangible factors which an appellate court cannot possibly evaluate.

Given all of these factors, we cannot say that the trial court abused its discretion in granting Plaintiff's motion for a new trial. This argument is without merit.

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**VII. Findings of Fact**

In their third argument, Defendants contend that the trial court's findings that the jury was influenced by fatigue or acted with an improper motive was not supported by competent evidence. We disagree.

Defendants argue that the trial court's order grossly overstates the amount of time that the jury was in the courtroom hearing the case, failing to subtract the time that the jury was on break or outside of the courtroom while non-jury matters were considered. They argue that the record, with only one exception, contains no complaint of or indications of juror fatigue.

As discussed above, the issue was whether there was "a palpable miscarriage of justice" in this case. Whether the jurors were in the courtroom for the entire time recited by the trial court in finding of fact 7 is not determinative of this issue. Even if they were not in the courtroom, the jurors were away from their homes, jobs, and daily routines. They were placed in a new, stressful environment. The decision of whether the rigorous trial schedule compromised justice in this case must of necessity rest with the presiding trial judge who was able to personally observe the effects of the trial schedule upon the jurors. The lack of specific documentation of complaints in the record does not mean that the findings of the trial court are unsupported.

Finally, Defendants contend that the trial court's conclusion that the decision of the jury to conclude the trial on the night of 3 July "very likely pushed the jurors to a hurried verdict driven by a desire to finish with the case so that they could enjoy the three day Fourth of July weekend" is merely conjecture, not supported by any evidence in the record.

The record shows that the jury deliberated for approximately forty-five minutes, returning a verdict at 10:45 p.m. on 3 July. Even if this finding is somewhat based upon speculation by the trial court, its other findings as to juror exhaustion adequately support the trial court's discretionary ruling to grant a new trial.

The trial court did not abuse its discretion in granting Plaintiff's motion for a new trial. The order of the trial court is affirmed.

**AFFIRMED.**

Judges ELMORE and HUNTER, JR., Robert N. concur.

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[201 N.C. App. 566 (2009)]

STATE OF NORTH CAROLINA v. ANTONIO WILLIAMS

No. COA09-388

(Filed 22 December 2009)

**1. Appeal and Error— notice—sufficient**

The State's oral notice of appeal of the trial court's decision to grant defendant's motion to suppress complied with N.C. R. App. P. 4(a)(1). The notice was given in open court when the court reconvened five days after the conclusion of the pretrial suppression hearing.

**2. Constitutional Law— encounter not a seizure—erroneous suppression of evidence**

The trial court committed reversible error in granting defendant's motion to suppress cocaine found on his person. Because the encounter between the police officer and defendant did not constitute a "seizure," the encounter did not implicate the Fourth Amendment prohibition against unreasonable searches and seizures. The order of the trial court was reversed.

Appeal by the State from order dated 13 November 2008, *nunc pro tunc* 13 August 2008, by Judge John O. Craig in Superior Court, Forsyth County. Heard in the Court of Appeals 17 September 2009.

*Attorney General Roy Cooper, by Assistant Attorney General Derrick C. Mertz, for the State.*

*Glover & Petersen, P.A., by Ann B. Petersen, for Defendant-Appellee.*

STEPHENS, Judge.

*I. Procedural History and Factual Background*

On 13 November 2007, Defendant was indicted on a charge of felony possession of cocaine. On 30 July 2008, Defendant filed a pretrial motion to suppress the cocaine seized as a result of a search of his person. Defendant's motion was heard on 13 August 2008 in Forsyth County Superior Court.

The State's evidence presented at the hearing tended to show the following: On 28 July 2007, Officer K.K. Wade ("Officer Wade") of the Winston-Salem Police Department was patrolling an area around West Academy Street. Officer Wade testified that around that time,

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officers had been advised to look for 30-day vehicle tags, as many had been stolen around the city.

At approximately 1:30 a.m., Officer Wade observed Defendant driving a vehicle displaying a 30-day tag he suspected was expired because it was dirty and worn. While Officer Wade ran the tag in his computer, he followed Defendant's vehicle. Before the response came back, Defendant pulled into a driveway in the 1100 block of West Academy Street. Officer Wade did not activate his blue lights or siren, nor did he give any other indication for Defendant to stop.

Once Defendant pulled into the driveway, Officer Wade pulled over to the curb on the other side of the street. When Officer Wade approached Defendant's vehicle, he recognized Defendant's passenger, as he had previously arrested her for narcotics possession and prostitution.

Officer Wade asked Defendant about the status of the 30-day tag, and Defendant told him it was expired. Officer Wade then asked Defendant for his license, and Defendant handed him an expired registration and admitted that he did not have a driver's license. Officer Wade asked Defendant to step out of the vehicle to speak with him. Officer Wade and Defendant walked to the sidewalk area behind the vehicle, at which point Officer Wade told Defendant that he recognized Defendant's passenger and "knew what kind of activity she was involved in." Officer Wade asked if Defendant had any outstanding warrants and if Defendant had any drugs on him, to which Defendant responded, "no." Defendant then consented to a search of his person, which revealed what appeared to be cocaine.

Based on the foregoing evidence, Judge Craig granted Defendant's motion to suppress the cocaine seized by Officer Wade, concluding that because "no additional reasonable suspicion of additional criminal activity existed, the officer's request for consent to search the defendant's person exceeded the scope of the stop, and the prolonged detention of [D]efendant violated the 4th Amendment." The State gave oral notice of appeal in open court on 18 August 2008, when the court reconvened. On 11 February 2009, the State filed a certification of its appeal with the trial court pursuant to N.C. Gen. Stat. § 15A-979(c) (2007) ("An order by the superior court granting a motion to suppress prior to trial is appealable to the appellate division of the General Court of Justice prior to trial upon certificate by the prosecutor to the judge who granted the motion that the appeal is not taken for the purpose of delay and that the evidence is essential to the case.").

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[201 N.C. App. 566 (2009)]

*II. Discussion**A. Notice of Appeal*

**[1]** Defendant argues that the State's alleged failure to comply with N.C. R. App. P. 4(a) precludes the State's appeal in this instance. Rule 4(a) provides that notice of appeal in criminal cases may be given by "giving oral notice of appeal at trial" or by filing a written notice of appeal. N.C. R. App. P. 4(a). Defendant argues that because there was no trial at which the State could have given oral notice and the State failed to file written notice of appeal, the State has failed to preserve its right to appeal.

Defendant's interpretation of the phrase "at trial" in Rule 4(a)(1) is misguided. Defendant would have this Court hold that oral notice of appeal given in open court is insufficient in the absence of a full trial. Defendant's interpretation is unreasonably narrow and is contrary to the law of this State. *See State v. Turner*, 305 N.C. 356, 359, 289 S.E.2d 368, 370 (1982) (allowing an appeal of a trial court's grant of a motion to suppress evidence where the State "gave oral notice of appeal in open court"); *State v. Lay*, 56 N.C. App. 796, 798, 290 S.E.2d 405, 406, *disc. review denied*, 306 N.C. 390, 294 S.E.2d 216 (1982) (finding that the State gave proper notice of appeal of a grant of a motion to suppress by "giving oral notice of appeal on . . . the day judgment was entered"). The State's oral notice of appeal given in open court when the court reconvened five days after the conclusion of the pretrial hearing is sufficient to comply with N.C. R. App. P. 4(a)(1). Defendant's argument is overruled.

*B. Motion to Suppress*

**[2]** We turn now to the State's contention that the trial court erred in granting Defendant's motion to suppress because the encounter between Officer Wade and Defendant does not constitute a "seizure," and thus falls outside the ambit of the Fourth Amendment. The scope of appellate review of a ruling upon a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). For the reasons which follow, we conclude that the trial court erred in granting the motion to suppress.

An encounter between a law enforcement officer and a citizen does not implicate the Fourth Amendment's prohibition against un-

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reasonable searches and seizures in the absence of a “seizure” of the person. *Florida v. Royer*, 460 U.S. 491, 498, 75 L. Ed. 2d 229, 236 (1983) (“If there is no detention—no seizure within the meaning of the Fourth Amendment—then no constitutional rights have been infringed.”). In *Florida v. Bostick*, 501 U.S. 429, 115 L. Ed. 2d 389 (1991), the Supreme Court of the United States held that

a seizure does not occur simply because a police officer approaches an individual and asks a few questions. So long as a reasonable person would feel free “to disregard the police and go about his business,” [*California v. Hodari D.*, 499 U.S. 621, 628, 113 L. Ed. 2d 690 (1991)], the encounter is consensual and no reasonable suspicion is required. The encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature. The Court made precisely this point in [*Terry v. Ohio*, 392 U.S. 1, 19, n. 16, 20 L. Ed. 2d 889, 905, n. 16 (1968)]: “Obviously, not all personal intercourse between policemen and citizens involves ‘seizures’ of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a ‘seizure’ has occurred.”

*Id.* at 434, 115 L. Ed. 2d at 398. Even in the absence of any suspicion that an individual is engaged in criminal activity, law enforcement officers may “pose questions, ask for identification, and request consent to search . . . provided they do not induce cooperation by coercive means.” *United States v. Drayton*, 536 U.S. 194, 201, 153 L. Ed. 2d 242, 251 (2002).

Absent physical force, a seizure occurs only if, “taking into account all of the circumstances surrounding the encounter, the police conduct would ‘have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.’” *Bostick*, 501 U.S. at 437, 115 L. Ed. 2d at 400 (quoting *Michigan v. Chesternut*, 486 U.S. 567, 569, 100 L. Ed. 2d 565, 569 (1988)).

Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer’s request might be compelled. In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.

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*United States v. Mendenhall*, 446 U.S. 544, 554-55, 64 L. Ed. 2d 497, 509-10 (internal citations omitted), *reh'g denied*, 448 U.S. 908, 65 L. Ed. 2d 1138 (1980).

Here, the trial court found that Defendant was seized within the meaning of the Fourth Amendment and that Officer Wade's subsequent search of Defendant was illegal based on this Court's holdings in *State v. Myles*, 188 N.C. App. 42, 654 S.E.2d 752 (2008) and *State v. Parker*, 183 N.C. App. 1, 644 S.E.2d 235 (2007). These cases are inapposite to the present case, however. In both *Myles* and *Parker*, a law enforcement officer initiated a stop of Myles' and Parker's vehicles after observing the commission of traffic infractions, and then detained the defendants for questioning about matters both related and unrelated to the traffic stop. *Myles*, 188 N.C. App. at 43-44, 654 S.E.2d at 753-54; *Parker*, 183 N.C. App. at 3-4, 644 S.E.2d at 238-39. Thus, the defendants in *Myles* and *Parker* were clearly seized within the meaning of the Fourth Amendment, and the validity of their detention was thereby squarely raised as an issue of constitutional proportion.

In the present case, however, Officer Wade did not initiate a traffic stop. Defendant did not pull into the driveway as a result of any show of authority from Officer Wade. Although Officer Wade suspected that Defendant's 30-day tag was expired, he did not receive confirmation of this until he was speaking with Defendant. There is no evidence that Officer Wade exerted any physical force or engaged in any show of authority during his brief<sup>1</sup> encounter with Defendant. Accordingly, the holdings of *Myles* and *Parker* under the Fourth Amendment are not relevant to the facts of this case.

Our analysis instead is informed by this Court's recent decision in *State v. Isenhour*, — N.C. App. —, 670 S.E.2d 264 (2008).<sup>2</sup> In *Isenhour*, two law enforcement officers were patrolling the area near a fast food restaurant parking lot, which was known for drug and prostitution activity. *Id.* at —, 670 S.E.2d at 266. The officers observed defendant and a passenger sitting in a car in the back corner of the parking lot, and noticed that neither the defendant nor his passenger had exited from the car during a ten-minute period. *Id.* The

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1. Officer Wade testified that approximately one to two minutes passed from the time he began the conversation with Defendant until he found the crack cocaine in Defendant's pocket.

2. We note that because our opinion in *Isenhour* was entered on 16 December 2008, the trial court did not have the benefit of this opinion when its order was entered on 13 November 2008, *nunc pro tunc* 13 August 2008.

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officers pulled up in a marked patrol car and parked approximately eight feet away from the defendant's car. *Id.* The officers approached the defendant's car and asked to speak with the defendant. *Id.* After becoming suspicious of the defendant's explanation for his presence in the parking lot, one officer asked the defendant to exit the vehicle, patted down the defendant, and received consent to conduct a search of the defendant's vehicle, which revealed illegal narcotics. *Id.*

Our Court held that the encounter between the officers and the defendant did not constitute a seizure for Fourth Amendment purposes. In concluding that the defendant was free to leave the scene at any time during the encounter, our Court noted: (1) that the defendant was free to drive away from the officers, as the patrol car did not physically block the defendant's car; (2) that "nothing else in [the officer's] behavior or demeanor amounted to the 'show of force' necessary for a seizure to occur[;]" (3) that the officers did not create "any real 'psychological barriers' to [the] defendant's leaving" such as activating their siren or blue lights, removing guns from their holsters, or using threatening language; and (4) "that the encounter proceeded in a non-threatening manner and that [the] defendant was cooperative at all times." *Id.* at —, 670 S.E.2d at 268; see also *State v. Christie*, 96 N.C. App. 178, 184, 385 S.E.2d 181, 184 (1989) (finding there was no seizure because police officers "did not display any weapons; they did not use threatening language or a compelling tone of voice; and they did not block or inhibit [the] defendant in any way from refusing to answer their questions or leav[ing] the [scene]").

Likewise in the present case, the encounter between Defendant and Officer Wade did not constitute a seizure under the Fourth Amendment. Officer Wade parked his patrol car on the opposite side of the street from the driveway in which Defendant was parked, and thus did not physically block Defendant's vehicle from leaving the scene. Further, Officer Wade did not activate the siren or blue lights on his patrol car. There is no evidence that he removed his gun from its holster, or used any language or displayed a demeanor suggesting that Defendant was not free to leave. As was the case in *Isenhour*, it appears that the encounter between Officer Wade and Defendant "proceeded in a non-threatening manner and that [D]efendant was cooperative at all times." *Id.* at —, 670 S.E.2d at 268. A reasonable person in these circumstances "would feel free 'to disregard the police and go about his business[.]'" *Bostick*, 501 U.S. at 434, 115 L. Ed. 2d at 398. We thus conclude that the encounter between Officer

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Wade and Defendant was entirely consensual, and Fourth Amendment scrutiny is not triggered.

Based on the foregoing, we hold that Defendant was not “seized” within the meaning of the Fourth Amendment. Accordingly, the trial court committed reversible error in granting Defendant’s motion to suppress. In light of this holding, we need not address the State’s remaining arguments. The order of the trial court is

REVERSED.

Judge BEASLEY concurs.

Judge HUNTER, JR. concurs in the result.

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STATE OF NORTH CAROLINA v. SHEBRIL LATREECE KIRB EVANS

No. COA09-361

(Filed 22 December 2009)

**Search and Seizure—probable cause—informant’s tip**

The trial court properly denied defendant’s motion to suppress crack cocaine seized as the result of a tip from an informant where the court made unchallenged findings about the reliability of the informant in the past, the details of the information provided in this case, and the accuracy of the information provided in this case.

Appeal by defendant from judgment entered 10 September 2008 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 3 November 2009.

*Attorney General Roy Cooper, by Assistant Attorney General Martin T. McCracken, for the State.*

*Mills & Economos, L.L.P., by Larry C. Economos, for defendant-appellant.*

BRYANT, Judge.

Defendant appeals from a judgment entered after defendant pled guilty to felony possession of cocaine. For the reasons stated herein, we affirm.

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[201 N.C. App. 572 (2009)]

*Facts*

On 19 October 2007, at approximately 6:30 p.m., Officer Greg Whitley, a narcotics and vice officer with the Smithfield Police Department, received a telephone call from a confidential informant. The informant had previously provided information to Officer Whitley approximately 15 to 20 times over the prior month, which led to six arrests and, at least once, served as the basis for a search warrant. Moreover, Officer Whitley testified that the informant gave valid, credible information as to all matters on which he informed.

On 19 October, the informant provided information about a delivery of cocaine. The informant stated that a white Ford Explorer would be used to deliver the drugs, and that the vehicle was currently parked on Brogden Road in Johnston County with a temporary 30-Day license tag. The vehicle would be driven to the Dollar General Store in Smithfield where the cocaine was to be delivered. The informant stated that a black female named Shebrail Evans would carry the drugs and that she would be the passenger in the Explorer. Ms. Evans would be wearing blue jeans, a black shirt, hoop earrings, and hair styled in a large blonde beehive. The informant believed that the cocaine would be in Ms. Evans' brassiere.

Officer Whitley drove down Brogden Road and verified that a white Ford Explorer with temporary 30-Day license tags was parked on that street.

At 6:50 p.m., the informant called Officer Whitley a second time and informed him that the White Ford Explorer had arrived at the Dollar General and that the driver's name was Michelle Royal. Officer Whitley along with Officers Dave Tyndall, Teresa Quinn, and Jacob Jones went to the Dollar General where they observed a white Ford Explorer in the parking lot occupied by two black females. The officers approached the vehicle and Officer Whitley asked for identification. The driver was Michelle Royal. The passenger, a black woman, wearing blue jeans, a black shirt, and with hair styled in a blonde beehive, was Shabrail Evans.

Officer Whitley informed the women that they were being approached because of information that Ms. Evans was in possession of cocaine, and on that basis, they would be temporarily detained. The officers searched the Ford Explorer and frisked the vehicle's occupants but found no contraband. Officer Whitley then informed both women they would be transported to the police station for a more

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thorough search. At the police station, a female officer took Ms. Evans into a bathroom. Once there, Ms. Evans stated, "We don't have to go through all this." She reached into her brassiere and withdrew a plastic bag containing approximately five grams of "crack" cocaine. Ms. Evans was then placed under arrest.

Defendant made a pre-trial motion to suppress all evidence seized incident to the search. In an order entered 25 August 2008, the trial court denied defendant's motion. Defendant entered into a plea agreement with the State. On 10 September 2008, defendant pled guilty to felony possession of cocaine but preserved her right to appeal the denial of her motion to suppress. The trial court entered judgment against defendant and sentenced defendant to a term of three to four months in the custody of the North Carolina Department of Correction. The sentence was suspended and defendant placed on probation for 24 months. Defendant appeals.

On appeal, defendant questions whether the trial court erred in denying her motion to suppress. She argues that the police seized cocaine by warrantless search and seizure in violation of the Constitution of the United States and the Constitution of North Carolina because the information provided by the confidential informant did not establish the probable cause needed to arrest and search defendant. We disagree.

The standard of review when appealing from a trial court's ruling on a motion to suppress is that "the trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting. The trial court's conclusions of law, however, are fully reviewable." *State v. Green*, — N.C. App. —, —, 670 S.E.2d 635, 637, *aff'd per curiam*, — N.C. —, — S.E.2d —, 2009 N.C. LEXIS 895 (2009) (citation omitted).

"When the justification for the stop reaches the threshold level of probable cause to arrest, the . . . jurisprudence of search incident to a lawful arrest governs the nature of a permissible search . . ." *See State v. Booker*, 44 N.C. App. 492, 494, 261 S.E.2d 215, 217 (1980) (citing C. Whitebread, *Constitutional Criminal Procedure* 147 (1978)). "Information from a confidential reliable informant can form the probable cause to justify a search. In utilizing an informant's tip, probable cause is determined using a totality-of-the [sic] circumstances[] analysis which permits a balanced assessment of the relative weights of all the various indicia of reliability (and unreliability) attending an informant's tip." *Green*, — N.C. App. at —, 670 S.E.2d

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at 637-38, *aff'd*, — N.C. —, — S.E.2d —, 2009 N.C. LEXIS 895 (2009) (brackets omitted).

The indicia of reliability may include (1) whether the informant was known or anonymous, (2) the informant's history of reliability, and (3) whether information provided by the informant could be and was independently corroborated by the police. An informant's tip is more reliable if it contains a range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted.

*State v. Collins*, 160 N.C. App. 310, 315, 585 S.E.2d 481, 485 (2003) (internal citations and quotations omitted).

In *Green*, the New Hanover County Sheriff's Department used a confidential, reliable informant to set up a sting operation to exchange one-half ounce of heroin and one-half ounce of a cutting agent for \$1,600.00. *Green*, — N.C. App. at —, 670 S.E.2d at 636. The dealer stated that he would begin traveling toward Wilmington, North Carolina thirty minutes after ending the call and that it would take him a while. The informant referred to the dealer as "Junior," described him as a black male in his fifties, and informed the officers that Junior would be driving either an older model Mercedes or a new model SUV, both brown in color, and both having a South Carolina registration. The informant also believed Junior would be driving from Charleston, South Carolina. *Id.* at —, 670 S.E.2d at 636-37. Given this, the officers estimated an arrival time between 3:30 p.m. and 4:00 p.m. along Highway 17 or Highway 87. At 3:35 p.m., while positioned along Highway 17, a New Hanover County detective observed a brown Dodge Durango SUV registered in South Carolina driven by an older black male. The detective determined that the vehicle was registered to Llyod [sic] Green, Jr., who resided in North Charleston. *Id.* at —, 670 S.E.2d at 637. Once inside New Hanover County, detectives stopped the SUV, and searched the vehicle interior. Within the center console, detectives found heroin and a cutting agent. After being convicted on charges of trafficking in heroin by transportation and possession, maintaining a vehicle to keep and sell heroin, possession of marijuana, and possession of drug paraphernalia, Green appealed the issue of whether the trial court erred in denying his motion to suppress evidence obtained as a result of the search. *Id.* at —, 670 S.E.2d at 637. We reasoned that, after balancing the various indicia of reliability and unreliability attendant to the

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informant's tip based on the totality of the circumstances, there was sufficient evidence to support the trial court's findings of fact and subsequent conclusion of law determining that probable cause to stop and search the defendant's vehicle existed. *Id.* at —, 670 S.E.2d at 640.

Here, in its order denying defendant's motion to suppress, the trial court made the following unchallenged findings of fact. On 19 October 2007, the confidential informant called Officer Whitley to inform him of a cocaine delivery that was scheduled to occur that evening. Officer Whitley had received information from this informant on 15 to 20 occasions over the previous month; six of those occasions led to arrests; and at least once, the informant's information served as the basis for a search warrant. Further, Officer Whitley once used the informant to make an undercover drug buy. As to the arrest in the instant case, the informant provided information about the vehicle to be used to deliver the drugs—a white Ford Explorer; as well as the route the vehicle would take and the destination—down Brogden Road headed toward the Dollar General Store in Smithfield; and the exact time the vehicle arrived at its destination—6:45 p.m. The informant provided specific information about the vehicle occupants: that Michelle Royal would be the driver; and the passenger, Shebrail Evans, would be a black woman wearing blue jeans, a black shirt, gold hoop earrings, with a blonde beehive hair style. And, the informant stated that the cocaine was likely located in the passenger's brassiere. All information provided by the informant regarding this subject proved to be accurate.

The trial court concluded that the arrest and search of defendant were valid based on both probable cause and search incident to arrest and denied defendant's motion to suppress. Based on the evidence of record supporting the trial court's findings of fact and conclusions of law, we hold the trial court properly denied defendant's motion to suppress. Accordingly, defendant's assignment of error is overruled.

Affirmed.

Judges WYNN and McGEE concur.

**MILLER v. MILLER**

[201 N.C. App. 577 (2009)]

MANUELA LENZ MILLER, PLAINTIFF v. FREDERICK MAX MILLER, DEFENDANT

No. COA09-311

(Filed 22 December 2009)

**1. Child Custody, Support, and Visitation— temporary custody order—did not become permanent order**

A temporary child custody order did not become a permanent custody order by operation of law. Competent evidence supported the trial court's finding that the custody matter had not become dormant after the temporary order was entered.

**2. Child Custody, Support, and Visitation— temporary custody order—best interest of the child**

The trial court did not err by modifying a temporary child custody order without finding that a substantial change of circumstances had occurred because the applicable standard of review for a temporary custody order is the best interest of the child.

Appeal by defendant from judgment entered 24 October 2008 by Judge Linda V.L. Falls in Guilford County District Court. Heard in the Court of Appeals 3 November 2009.

*C. Richard Tate, Jr. and Katherine Freeman, PLLC, by Katherine Freeman, for defendant-appellant.*

*No brief filed by plaintiff-appellee.*

BRYANT, Judge.

Defendant Frederick Miller appeals from a child custody order entered 24 October 2008 in Guilford County District Court. For the reasons stated herein, we affirm.

Defendant and Plaintiff Manuela Miller married on 24 May 1998. One child was born of the marriage on 10 March 1999. The couple separated on 19 February 2006. On 13 January 2006, in High Point, North Carolina, plaintiff filed a complaint for divorce from bed and board and child custody.

On 26 May 2006, the trial court entered a consent order awarding the parties temporary joint custody of the child. Plaintiff was awarded physical custody eight nights out of each two week interval

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and defendant was awarded the remaining six nights. The order specified that the issue of final child custody, alimony, additional attorney fees, and equitable distribution of marital property would remain pending until resolved by the trial court.

On 23 January 2007, defendant filed an “Answer, Defense, and Counterclaim” to plaintiff’s original complaint for child custody. Following a hearing held 14-16 May 2008, the trial court, on 24 October 2008, entered a permanent child custody order. The trial court ordered that plaintiff retain physical custody of the child during the school year and that defendant have physical custody during the summer months. Defendant appeals.

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On appeal, defendant raises the following issues: whether the trial court erred by (I) finding and concluding that the temporary child custody order had not become a permanent custody order as of May 2008; (II) by applying the best interest standard; and (III) in overruling the consent order.

*I and II*

[1] Defendant argues the trial court committed reversible error by concluding that the 26 May 2006 consent order remained a temporary order two years after it was entered at the time of the May 2008 trial on child custody. Defendant contends that the 26 May 2006 consent order became a permanent custody order by operation of law. As such, the trial court should have considered a change in the custody provisions only upon a finding of a substantial change in circumstances, rather than the best interest of the child. We disagree.

Our trial courts are vested with broad discretion in child custody matters. This discretion is based upon the trial courts’ opportunity to see the parties; to hear the witnesses; and to detect tenors, tones, and flavors that are lost in the bare printed record read months later by appellate judges. . . . In addition to evaluating whether a trial court’s findings of fact are supported by substantial evidence, [an appellate court] must determine if the trial court’s factual findings support its conclusions of law.

*Martin v. Martin*, 167 N.C. App. 365, 367, 605 S.E.2d 203, 204 (2004) (citation omitted).

Under North Carolina General Statutes, section 50-13.7(a), “an order of a court of this State for custody of a minor child may be modified or vacated at any time, upon motion in the cause and a showing

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of changed circumstances by either party or anyone interested.” N.C. Gen. Stat. § 50-13.7(a) (2007). “[A] decree of custody is entitled to such stability as would end the vicious litigation so often accompanying such contests, unless it be found that some change of circumstances has occurred affecting the welfare of the child so as to require modification of the order.” *Pulliam v. Smith*, 348 N.C. 616, 620, 501 S.E.2d 898, 900 (1998) (citation omitted). “However, if a child custody or visitation order is considered temporary, the applicable standard of review for proposed modifications is ‘best interest of the child,’ not ‘substantial change in circumstances.’” *Simmons v. Arriola*, 160 N.C. App. 671, 674, 586 S.E.2d 809, 811 (2003) (citation omitted).

“There is no absolute test for determining whether a custody order is temporary or final.” *LaValley v. LaValley*, 151 N.C. App. 290, 292, 564 S.E.2d 913, 915 (2002). “A temporary order is not designed to remain in effect for extensive periods of time or indefinitely . . . .” *Id.* at 293, 564 S.E.2d at 915 n.5. “Temporary custody orders resolve the issue of a party’s right to custody pending the resolution of a claim for permanent custody.” *Brewer v. Brewer*, 139 N.C. App. 222, 228, 533 S.E.2d 541, 546 (2000) (citation omitted). “An order is considered temporary only if it either (1) states a ‘clear and specific reconvening time’ that is reasonably close in proximity to the date of the order; or (2) does not determine all the issues pertinent to the custody or visitation determination.” *Simmons*, 160 N.C. App. at 674-75, 586 S.E.2d at 811 (citation omitted). This Court has held that where the reconvening time is potentially over a year away, the interval between the two hearings is not reasonably brief. *See Brewer*, 139 N.C. App. at 228, 533 S.E.2d at 546. However, “all custody orders are from their very nature temporary and founded upon conditions and circumstances existing at the time of the hearing.” *Brandon v. Brandon*, 10 N.C. App. 457, 460, 179 S.E.2d 177, 179 (1971) (citation omitted). Where a party is attempting to have the matter heard within a reasonable period of time, that party should not lose the benefit of a temporary order. *See LaValley*, 151 N.C. App. at 293, 564 S.E.2d at 915 n.5.

Here, on 26 May 2006, the trial court entered a consent order wherein it concluded that “[t]he parties are entitled to have the [trial] court order the terms agreed upon by them and set out in decrees in resolution of all issues between them, as the same are fair, just and appropriate . . . .” The trial court ordered that plaintiff and defendant have temporary joint custody of their minor child. The order sched-

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ules custody of the minor child over two week intervals and holidays applicable to the ensuing years and summer vacation in the year 2006. Barring holidays and vacations, plaintiff had physical custody eight days out of fourteen and defendant had physical custody the remaining six days. The order considers how the minor child's passport was to be held, how school clothes and supplies were to be transferred between parents, and the manner in which medical care was to be recorded and communicated to the non-present parent. The order created a schedule for child support payments and designated defendant as the party responsible for maintaining the child's medical, dental, and prescription drug insurance coverage. The order did not specify a reconvening time. The trial court heard arguments from each party and, at the hearing, announced that the parties were to continue under the consent order. On 22 September 2006, the trial court entered an order in accordance with its oral statements. On 5 October 2006, plaintiff filed a motion to amend the 22 September order. This was granted 15 June 2007. On 29 December 2006, plaintiff filed a motion to compel mediation or in the alternative, for the court to waive child custody mediation. Plaintiff alleged that defendant had not participated in child custody mediation scheduled in April 2006, May 2006, and October 2006. On 23 January 2007, defendant filed an answer to plaintiff's 13 January 2006 complaint seeking child custody. On 11 May 2007, plaintiff again filed a motion for modification of the 26 May 2006 order. On 29 May 2007, defendant filed a motion to compel plaintiff to submit to psychiatric and psychological examinations. On 13 July 2007, pursuant to plaintiff's motion, the trial court modified the 26 May 2006 Consent Order to grant plaintiff three weeks of physical custody in order for plaintiff to take the minor child on a trip to Germany. On 14 through 16 May 2008, a trial was held on plaintiff's complaint seeking child custody filed 13 January 2006.

On 24 October 2008, the trial court entered a child custody order in which it found that the case had not been dormant as the parties had continued to pursue claims for child custody. The trial court determined that the 26 May 2006 consent order had not become a permanent order but remained temporary. After considering the evidence presented at the hearing and on the record, the trial court concluded that it was in the best interest of the minor child that plaintiff retain physical custody of the child during the school year and defendant have physical custody during the summer months.

We hold that there is competent evidence to support the trial court's finding that the child custody matter did not lie dormant after

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the 26 May 2006 consent order was entered and this finding supports the trial court's conclusion that the 26 May 2006 consent order remained a temporary order. Therefore, the trial court did not err in utilizing the best interest of the child standard to establish child custody rather than reviewing the evidence for a substantial change in circumstances. *See Simmons*, 160 N.C. App. at 674, 586 S.E.2d at 811. Accordingly, defendant's assignments of error are overruled.

## III

[2] Next, defendant argues that the trial court erred by overruling the 26 May 2006 consent order by entering the 24 October 2008 child custody order absent finding a substantial change in circumstances. We disagree.

If a child custody or visitation order is considered final or permanent, the court may not make any modifications to that order without first determining that there has been a substantial change in circumstances in the case. However, if a child custody or visitation order is considered temporary, the applicable standard of review for proposed modifications is best interest of the child, not substantial change in circumstances.

*Simmons*, 160 N.C. App. at 674, 586 S.E.2d at 811 (internal citations and quotations omitted). Accordingly, we overrule defendant's assignment of error.

Affirmed.

Judges WYNN and McGEE concur.

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IN THE MATTER OF: S'N.A.S., S'L.A.S., AND S'R.A.S., MINOR CHILDREN

No. COA09-959

(Filed 22 December 2009)

**Termination of Parental Rights— failure to serve timely summons—waiver based on general appearance**

The trial court had jurisdiction to terminate respondent mother's parental rights because, although she was not served with the summonses until after their expiration, she made a general appearance in the action before the trial court at the non-

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[201 N.C. App. 581 (2009)]

secure custody hearings, thereby waiving any objection to personal jurisdiction.

Appeal by respondent-mother from orders entered 1 April 2009 by Judge David A. Leech in Pitt County District Court. Heard in the Court of Appeals 30 November 2009.

*Elizabeth Myrick Boone, for Pitt County Department of Social Services, petitioner-appellee.*

*Pamela Newell Williams, for Guardian ad Litem.*

*Janet K. Ledbetter, for respondent-appellant mother.*

JACKSON, Judge.

Respondent appeals from an order terminating her parental rights to three of her children. For the reasons set forth below, we affirm.

On 17 January 2008, the Pitt County Department of Social Services (“DSS”) filed juvenile petitions alleging that S’N.A.S., age five months, and twins S’L.A.S. and S’R.A.S., age one year, were neglected and dependent juveniles. The petitions alleged that respondent lacked stable housing and employment, failed to provide food or diapers for the juveniles, and failed to meet the medical needs of the juveniles. The petitions further alleged that respondent had been “in and out of prison” and had been living in shelters and motels. The trial court entered three non-secure custody orders on 17 January 2008. On 18 January 2008, a summons was issued in each case to respondent. A week later, the trial court held a non-secure custody hearing at which respondent appeared with her appointed attorney. On 28 January 2008, the trial court entered an order on the need for continued non-secure custody in each case. The trial court found that respondent currently could not provide proper care or supervision and that it was not in the best interests of the juveniles to be returned to her care. The trial court ordered respondent to (1) submit to a pregnancy test, (2) submit to random drug screens, (3) apply to at least one job per day for employment, (4) enroll at the Employment Security Commission, (5) enroll and attend the STRIVE program, and (6) provide information pertaining to the whereabouts of the juveniles’ father<sup>1</sup>.

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1. The juveniles’ father is not a party to this appeal.

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On 7 February 2008, the trial court held another non-secure custody hearing for the three children. Respondent and her attorney were present at the hearing. In its three separate orders on the need for continued non-secure custody filed 8 February 2008, the trial court found that “[t]he Court began hearing on Adjudication and[,] on a motion made by Wanda Naylor[,] continued hearing to [February] 27-28[, 20]08 to allow the Court to receive photographs of the juvenile[s].” At the 28 February 2008 hearing, the trial court found that there was insufficient time to hear the case due to “2 priority cases” and because “service is pending on respondent mother.” The court entered an order continuing non-secured custody.

On 26 March 2008, the trial court entered a non-secure custody order continuing custody with DSS. The order found that “Respondent Father has been served. Service is still pending on Respondent Mother[,]” and the court set the date for the adjudication hearing for 27 March 2008. The order further noted that the trial court denied the motion to continue made by respondent’s attorney.

The trial court held an adjudication and disposition hearing on 27 March 2008. Respondent did not attend the hearing, but she was represented by her attorney. By adjudication orders filed 2 May 2008, the trial court adjudicated the children neglected and dependent juveniles. The trial court found that respondent had not been served with the juvenile petition and summons because they erroneously were sent to Lenoir County and not Greene County. The trial court also found that respondent “was present and did participate by testifying in both the January 24, 2008 and February 7, 2008 Continued Non-Secure Custody hearings in this matter.” The trial court further found that respondent was ordered on 24 January 2008 to submit to a pregnancy test, and it was determined that she is currently pregnant. In its three disposition orders filed 2 May 2008, the trial court ordered legal custody of the juveniles be with DSS and ordered that respondent have supervised visitation.

On 28 March 2008—the day following the adjudication and disposition hearing—respondent personally was served with the three juvenile petitions and summonses by the Sheriff. A three-month review order was filed on 11 July 2008, and a permanency planning order was filed on 5 November 2008. On 25 November 2008, DSS filed three separate petitions to terminate the parental rights of respondent as to the three children based upon neglect pursuant to North Carolina General Statutes, section 7B-1111(a)(1); willfully leaving the

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child in foster care for a continuous period of six months next preceding the filing of the petition and willfully failing to pay a reasonable portion of the cost of care of the juveniles during that time notwithstanding respondent's ability to do so pursuant to section 7B-1111(a)(3); and having her parental rights to another child terminated involuntarily and her lack of an ability or willingness to establish a safe home pursuant to section 7B-1111(a)(9). Three summonses were issued, and the mother was served with the summonses and petitions on 9 December 2008.

On 19 February 2009, the trial court held a termination hearing, at which respondent and her attorney were present and during which respondent testified. At the end of the hearing, the trial court advised the parties that the termination hearing would be continued until 5 March 2009. Respondent, who had transportation problems, did not appear at the continuation of the termination hearing, but had contacted her attorney and asked that he "stand in for her." By orders filed 1 April 2009, the trial court found that respondent (1) was unemployed, (2) had not provided support for the children except for snacks during visitation and a birthday cake for S'N.A.S., (3) had failed to obtain housing, (4) had failed to attend STRIVE, (5) had failed to enroll with the Employment Security Commission, and (6) previously had her parental rights involuntarily terminated to four other children. The trial court further found that grounds existed to terminate respondent's parental rights pursuant to North Carolina General Statutes, sections 7B-1111(a)(1), (a)(3), and (a)(7). The trial court concluded that it was in the best interest of the juveniles to terminate respondent's parental rights. Respondent appeals.

On appeal, respondent contends that the trial court lacked subject matter jurisdiction to hear and rule on the termination petition. Respondent argues that because the summons in the underlying neglect and dependency petition was not served on her within sixty days after the date of the issuance of summons pursuant to North Carolina Rules of Civil Procedure, Rule 4(c), the trial court was deprived of jurisdiction over her and the matter, and therefore, the court's order placing custody with DSS was void. Respondent further argues that if the custody order was void, DSS never had legal custody of her children, and therefore, DSS lacked standing to file the termination petition. Based upon these arguments, respondent concludes that (1) DSS lacked standing to file the termination petition, and (2) the trial court lacked subject matter jurisdiction to terminate her parental rights. We disagree.

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Our Supreme Court recently held that “the summons is not the vehicle by which a court obtains subject matter jurisdiction over a case, and failure to follow the preferred procedures with respect to the summons does not deprive the court of subject matter jurisdiction.” *In re K.J.L.*, 363 N.C. 343, 346, 677 S.E.2d 835, 837 (2009). The Court also held that “failure to legally issue a summons” implicated only personal jurisdiction. *Id.* at 345-46, 677 S.E.2d at 837. *In re K.J.L.* further stated that “the summons affects jurisdiction over the person rather than the subject matter, [and] a general appearance by a civil defendant ‘waive[s] any defect in or nonexistence of a summons.’” *Id.* at 347, 677 S.E.2d at 837 (quoting *Dellinger v. Bollinger*, 242 N.C. 696, 698, 89 S.E.2d 592, 593 (1955) (citations and emphasis omitted)).

Applying *In re K.J.L.* to the facts of this case, we conclude the trial court had jurisdiction to terminate respondent’s parental rights. Here, a summons was issued on 18 January 2008, a day after the juvenile petitions were filed. Although respondent was not served with the summonses until after their expiration, she made a general appearance in the action before the trial court at the non-secure custody hearings on 24 January 2008 and 7 February 2008, thereby waiving any objection to personal jurisdiction. Accordingly, the trial court had jurisdiction over the underlying neglect and dependency action and issued a valid custody order to DSS, giving DSS standing to file the instant petition for termination of parental rights pursuant to North Carolina General Statutes, section 7B-1103(a)(3). Accordingly, respondent’s argument is without merit, and the trial court’s order is affirmed.

Affirmed.

Judges HUNTER, Robert C. and BRYANT concur.

**WADDELL v. METRO. SEWERAGE DIST. OF BUNCOMBE CNTY.**

[201 N.C. App. 586 (2009)]

TIMOTHY R. WADDELL, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF JILL J. WADDELL, DECEASED, AND WILLIAM WAYNE JAMESON, AS GUARDIAN AD LITEM OF EMILY WADDELL, A MINOR CHILD, AND REID WADDELL, A MINOR CHILD, PLAINTIFFS V. METROPOLITAN SEWERAGE DISTRICT OF BUNCOMBE COUNTY, TYCOLE ENTERPRISES, LLC, CIVIL DESIGN CONCEPTS, P.A., JUDITH W. DAWKINS, REALTY EXECUTIVES WNC, INC., KEITH VINSON, AND WAIGHTSTILL MOUNTAIN PROPERTY OWNERS ASSOCIATION, LLC, DEFENDANTS

No. COA09-620

(Filed 22 December 2009)

**Appeal and Error—interlocutory order—failure to argue substantial right**

Plaintiffs' appeal from two interlocutory orders in a negligence and gross negligence case was dismissed because plaintiffs failed to advance any argument that the orders deprived them of a substantial right.

*Appeal by plaintiffs from orders entered 7 and 8 October 2008 by Judge J. Marlene Hyatt in Buncombe County Superior Court. Heard in the Court of Appeals 4 November 2009.*

*Motley Rice LLC, by John D. Hurst; and Wallace and Graham, P.A., by Michael B. Pross, for plaintiff-appellants.*

*Little & Little, PLLC, by Cathryn M. Little, for defendant-appellee Metropolitan Sewerage District of Buncombe County.*

*Van Winkle, Buck, Wall, Starnes and Davis, P.A., by W. James Johnson and Matthew W. Kitchens for defendant-appellee Civil Design Concepts, P.A.*

STEELMAN, Judge.

Where plaintiffs appeal two interlocutory orders and fail to advance any argument that the orders deprive them of a substantial right that would be lost without immediate appellate review, the appeal is dismissed.

**I. Factual and Procedural Background**

On 30 November 2004, Timothy and Jill Waddell purchased a home in Arden, Buncombe County, North Carolina. Following a snowfall of approximately 3 inches on 29 January 2005, Jill Waddell went outside with her children to play in the snow, using an inner tube to slide down a 100 to 150 foot hill. The inner tube used by Jill

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Waddell rotated, resulting in her going down the hill backwards. She collided with a sewer manhole that was elevated approximately two and one half feet above ground level, and suffered injuries resulting in her death.

On 30 December 2005, Timothy Waddell, individually and as Administrator of the Estate of Jill Waddell, and William Jameson as Guardian *ad litem* of Emily and Reid Waddell (collectively, plaintiffs) filed this action seeking monetary damages as a result of the death of Jill Waddell. A second amended complaint was filed on 23 January 2007. The complaint alleged negligence and gross negligence against numerous defendants<sup>1</sup> based upon a variety of legal theories as follows: (1) Metropolitan Sewerage District of Buncombe County (MSD) for the design and approval of the sewer, failing to maintain its sewer easement in a safe condition, and concealing the manhole that protruded two and a half feet above the ground; (2) TyCole Enterprises, LLC, for negligence in the design and implementation of the grading of the area; (3) Waightstill Mountain, LLC and Keith Vinson for negligence in the development of the subdivision, and in the hiring and supervising of the design and installation of the manhole; (4) Civil Design Concepts, P.A. (CDC) for negligence in the design and engineering resulting in a manhole that protruded two and a half feet above the ground; (5) Judith Dawkins for negligence as a realtor for failure to warn as to the dangers of the manhole that protruded two and a half feet above the ground; and (6) Realty Executives WNC, Inc. for negligence based upon the conduct of Judith Dawkins.

On 3 September 2008, MSD moved for summary judgment. On 10 September 2008, CDC moved for summary judgment. On 8 October 2008, the trial court granted summary judgment in favor of MSD. On 7 October 2008, the trial court granted summary judgment in favor of CDC. The record is devoid of any information concerning any disposition of plaintiffs' claims against the remaining defendants. Plaintiffs appeal.

## II. Interlocutory Appeal

Since the orders granting summary judgment in favor of MSD and CDC did not dispose of all the claims and defendants, leaving further

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1. The record contains an oblique reference to the voluntary dismissal of McGill Associates, P.A., Hutchinson-Biggs & Associates, Inc., T & K Utilities, Inc., Design Associates, and Waightstill Mountain Property Owners Association, Inc. as named defendants. However, there are no orders or dismissals in the record, which establish that these defendants have been dismissed from the case.

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matters for resolution by the trial court, they are interlocutory orders. *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). There is no automatic right to appeal an interlocutory order. *Currin & Currin Constr., Inc. v. Lingerfelt*, 158 N.C. App. 711, 713, 582 S.E.2d 321, 323 (2003). In order to appeal an interlocutory order, an appellant must demonstrate that either the trial court certified its order for immediate appeal pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure, or that the order deprives the appellant of a substantial right. *Id.* There was not a Rule 54(b) certification in this case. Therefore, plaintiffs must show a substantial right.

Rule 28(b)(4) of the North Carolina Rules of Appellate Procedure states:

(b) *Content of appellant's brief.* An appellant's brief in any appeal shall contain, under appropriate headings, and in the form prescribed by Rule 26(g) and the Appendixes to these rules, in the following order:

....

(4) *A statement of the grounds for appellate review.* Such statement shall include citation of the statute or statutes permitting appellate review. . . . When an appeal is interlocutory, that statement must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.

N.C.R. App. P. 28(b)(4) (2009).

The entire statement of the grounds for appellate review contained in plaintiffs' brief reads: "Judge Hyatt's summary judgment orders, dismissing all the Plaintiffs' claims against Defendants MSD and CDC, are a final judgments [sic] and appeals therefore lie to the Court of Appeals pursuant to N.C. Gen. Stat. § 7A-27(b)." Nowhere in their brief do plaintiffs recognize that the orders appealed from are interlocutory. Nowhere in their brief do plaintiffs assert that the orders deprive them of a substantial right that would be lost without immediate appellate review.

"It is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order[.]" *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994). The appellate courts can only hear matters

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that are properly brought before them by the litigants. We cannot maintain our role as impartial arbiters if we comb through the record to find legal issues unaddressed by the parties, or raise and address legal theories not argued by the parties. The appeal in this case must be dismissed.

DISMISSED.

Judges ELMORE and HUNTER, JR., Robert N. concur.

## CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 22 DECEMBER 2009)

DEL-RIO v. CLARENDON AM. INS. CO. No. 09-780	Pitt (08CVS179)	Affirmed
HELMS v. LANDRY No. 09-473	Mecklenburg (01CVD13214)	Affirmed
HERBERT v. HERBERT No. 09-225	Pitt (05CVS396)	Appeal dismissed
HUTCHINSON v. FENDER No. 09-156	Buncombe (06CVS5852)	No Error
IN RE A.J.M.B. No. 09-532	Cabarrus (07JB168)	Affirmed
IN RE A.S. No. 09-1039	Durham (08J135)	Affirmed
IN RE D.A.H. No. 09-920	Burke (07J146)	Affirmed in Part, Reversed in Part and Remanded
IN RE K.M.F. AND J.K.F. No. 09-613	Rowan (07JT0203) (07JT0202)	Reversed and Remanded
IN RE M.L.J. No. 09-1038	Davie (07J66)	Affirmed
IN RE M.P.A. No. 09-856	Polk (06J44)	Dismissed
IN RE M.W. AND J.W. No. 09-1009	Wake (07JT725-726)	Affirmed
IN RE R.A.E. No. 08-1024-2	Wilkes (02JT218)	Vacated
IN RE S.R.W. No. 09-704	Rockingham (08JT96)	Affirmed
IN RE S.S.J. No. 09-1022	Mecklenburg (07JA441)	Affirmed
IN RE T.H., C.H., AND K.B. No. 09-835	Forsyth (06JT0304) (06JT0305) (06JT0303)	Affirmed
LAVALLEY v. LAVALLEY No. 09-230	Carteret (01CVD875)	Affirmed

MORGAN v. MORGAN No. 09-246	Henderson (03CVD1489)	Affirmed in Part, Reversed in Part and Remanded
STATE EMPs. CREDIT UNION v. HENDRYX No. 09-417	Durham (07CVS1686)	Affirmed
STATE v. BANKS No. 09-454	Rowan (05CRS7832) (05CRS54726) (05CRS54174)	No Error
STATE v. BOLTON No. 09-663	Wake (07CRS12744)	Affirmed
STATE v. BROOKS No. 09-358	Forsyth (08CRS7628) (08CRS51715)	No Error
STATE v. BROWN No. 09-624	Halifax (08CRS51572) (08CRS51583) (08CRS51571)	Vacated in part and no error in part
STATE v. CARBAJAL No. 09-378	Wake (07CRS78457)	No Error
STATE v. CICCOLELLA No. 09-630	Forsyth (07CRS52925)	No Error
STATE v. CONN No. 09-257	Henderson (07CRS54025)	No Error
STATE v. CRUZ No. 09-373	Wake (07CRS60280) (07CRS60281) (07CRS60279)	No Error
STATE v. FOX No. 09-535 (07CRS1525)	Madison (08CRS484)	No Error
STATE v. GRICE No. 09-469	Cabarrus (05CRS16818)	No prejudicial error
STATE v. LAFLORA No. 09-484	Forsyth (04CRS52233) (04CRS52219)	Affirmed
STATE v. LIGON No. 09-685	Buncombe (03CRS56382) (03CRS56381)	No Error
STATE v. MARTINEZ No. 09-455	Mecklenburg (07CRS240071) (07CRS240070)	Dismissed

STATE v. McINTYRE No. 09-414	Cumberland (07CRS18784)	No Error
STATE v. NEAL No. 09-312	Guilford (08CRS089310) () (51)	Affirmed
STATE v. PARHAM No. 09-791	Durham (06CRS49046) (06CRS12864)	No prejudicial error
STATE v. PARKER No. 09-497	Nash (04CRS54096)	No Error
STATE v. REDMOND No. 09-508	Henderson (08CRS3128) (08CRS50375)	No prejudicial error
STATE v. ROBERTS No. 09-517	Madison (04CRS2441) (04CRS2440)	Affirmed
STATE v. ROUGHTON No. 09-536	Wilson (07CRS54973) (07CRS549723) (07CRS054972)	First Degree Rape— New Trial; 07CRS054972 Taking Indecent Liberties with a Child—No error; 07CRS054972 Order for Lifetime Satellite Based Monitoring—Vacated. 07CRS054973 First Degree Rape—New Trial; 07CRS054973 Taking Indecent Liberties with a child—No Error
STATE v. SATTERWHITE No. 09-519	Forsyth (07CRS57596) (07CRS37922)	No Error
STATE v. SIMPSON No. 09-710	Mecklenburg (07CRS201451) (07CRS201444) (07CRS201449) (07CRS201452) (07CRS201445) (07CRS201450) (07CRS201442) (07CRS201446)	No error at trial; remanded for re- sentencing

STATE v. THORPE No. 09-680	Person (08CRS50354)	No Error
STATE v. TORRES-GARCIA No. 09-409	Mecklenburg (07CRS237845) (07CRS237844)	Affirmed

**STATE v. MUMFORD**

[201 N.C. App. 594 (2010)]

STATE OF NORTH CAROLINA v. AUBREY ALBERTO MUMFORD

No. COA09-300

(Filed 5 January 2010)

**1. Motor Vehicles— driving while impaired—felony serious injury by vehicle—sufficient evidence**

The trial court did not err in denying defendant's motion to dismiss charges of felony serious injury by vehicle because the State presented sufficient evidence that defendant was driving while impaired at the time of the incident in question.

**2. Motor Vehicles— driving while impaired—felony serious injury by vehicle—conviction inconsistent**

The trial court erred in denying defendant's motion to set aside the jury's convictions on five counts of felony serious injury by vehicle where the jury's "not guilty" verdict on a driving while impaired charge negated an essential element necessary to support a conviction of felony serious injury by vehicle. The jury outcome was logically inconsistent and legally contradictory as the elements of felony driving while impaired causing serious injury statutorily require conviction of driving while impaired.

**3. Criminal Law— restitution—insufficient evidence**

The trial court erred in ordering defendant to pay restitution in the amount of \$228,043.84 for convictions of misdemeanor hit and run and driving while license revoked. Defendant did not agree or stipulate to the amount of restitution and the evidence adduced at trial was insufficient to justify the amount of restitution.

Appeal by defendant from judgments entered 10 September 2008 by Judge Paul L. Jones in Greene County Superior Court. Heard in the Court of Appeals 3 September 2009.

*Attorney General Roy Cooper, by Special Deputy Attorney General Philip A. Telfer, for the State.*

*McCotter, Ashton & Smith, P.A., by Rudolph A. Ashton, III and Kirby H. Smith, III, for defendant appellant.*

HUNTER, JR., Robert N., Judge.

Aubrey Alberto Mumford ("defendant") appeals from judgments entered on jury verdicts of guilty of misdemeanor hit and run and five

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counts of felony serious injury by vehicle. After review, we hold that the trial court erred in accepting inconsistent verdicts of not guilty of driving while impaired and guilty of felony serious injury by vehicle. The former is a statutory element of the latter. Therefore, we vacate the verdicts.

**I. Factual Background**

On 8 June 2007, a high school graduation party was held at a home on a two-lane highway in Greene County. Partygoers parked cars on both sides of the road near the home. Sometime after the party began, Captain Robert Davenport (“Captain Davenport”) arrived after receiving complaints from neighbors, whereupon he asked the hosts to turn down the music volume. After Captain Davenport left, uninvited guests arrived, resulting in several altercations. Gunfire erupted and partygoers began leaving the party and walking in the road.

About the time the gunfire erupted, a Cadillac, driven by defendant, approached that part of the road used by the departing partygoers. After defendant’s car was hit by a bullet, his car struck Devarus Smith, Jordan Smith, Keendran Tyson, Rosslin Becton, and Rodney Lee Wilkes causing severe injuries requiring hospitalization.

Responding to a call for help, Captain Davenport returned to the scene at 12:36 a.m. with Trooper Billy Ron Beamon (“Trooper Beamon”). Their accident report indicates that the collisions occurred at 12:31 a.m. The officers assisted victims, requested emergency medical personnel, and then began a criminal investigation of the scene. The officers found shell casings from a .9 millimeter handgun, a Cadillac hood ornament, and pieces of a vehicle grill on the road near where the vehicle hit the victims.

Subsequently, Deputy Sheriff Jason Spencer located the Cadillac at defendant’s grandmother’s home. Deputy Sheriff Spencer noticed that a large portion of the grill and the hood ornament were missing, and bullet holes were in the back window area of the driver’s side of the vehicle, near the muffler. Deputy Sheriff Spencer also found a beer bottle top inside the Cadillac. Captain Davenport and Trooper Beamon were notified that a suspect, Aubrey Alberto Mumford, defendant, was in custody at the Sheriff’s office. When Captain Davenport arrived at the Sheriff’s office at 2:30 a.m., he advised defendant of his Miranda rights.

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Trooper Beamon concluded that defendant was impaired based on the strong odor of alcohol coming from defendant while he was in custody. Authorities placed defendant under arrest for driving while impaired and asked defendant to take an intoxilyzer test. Trooper Beamon advised defendant of his chemical analysis rights at 3:28 a.m. After a fifteen-minute observation period, defendant blew a .09 alcohol blood level at 3:47 a.m. After the intoxilyzer results recorded, defendant was informed of his results and taken to the magistrate's office where Trooper Beamon charged defendant with felony hit and run, driving while impaired, and driving while license revoked. Defendant was processed and released to the county jail after being formally charged by the magistrate.

On 9 June 2007, after being advised of his Miranda rights, defendant gave a written statement to Captain Davenport. Defendant stated that at 6:00 p.m. the previous day, he was at home having a 32-ounce beer when he received a call from his cousin who told defendant to come to his grandmother's house. Defendant left his home and drove to his grandmother's house, stopping to buy another 32-ounce beer along the way. He stayed briefly at his grandmother's house and left to make another stop at another person's home where he had a shot of liquor. Defendant then went to the barber shop where he took two swallows from the beer that he had purchased earlier.

After defendant left the barber shop and was on the way back to his grandmother's house, defendant came upon a large crowd of people standing in the road. Defendant was driving about 50 m.p.h. and had on his low beam headlights when he noticed the people in the road. Defendant said he slammed on the brakes. In addition, defendant stated he saw a man go under his car and felt the car run over the man. Defendant said he was going to get out of his car, but someone began shooting at him. He then laid in the seat and pressed the gas pedal. After the incident, defendant returned to his grandmother's house and took two or three big swallows of the beer he purchased earlier and put it back in the car. Defendant then began walking down the street until a police officer took him in custody.

On 3 March 2008, defendant was charged in an indictment with the following: (1) one count of felony hit and run; (2) five counts of felony serious injury by vehicle while engaged in the offense of impaired driving; (3) one count of driving while impaired; and (4) one count of driving while license revoked. Defendant pled guilty to driving while license revoked prior to trial. On 8 September 2008,

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defendant stood trial for the 3 March 2008 indictment in Greene County Superior Court.

At trial, Trooper Beamon testified that he was aware that defendant consumed alcohol after the accident, but that two or three big swallows of beer was not enough to account for defendant's elevated alcohol level. Trooper Beamon projected, based upon the tests he administered, that if at the time of the test defendant's alcohol level was .09, then three hours earlier, at the time of the incident, his alcohol level would have been .15. Further, Trooper Beamon testified that he ran a DMV record check that showed defendant's license was permanently suspended. Defendant's DMV record was identified as State's exhibit "28" and the State introduced the record into evidence based on Trooper Beamon's testimony. When the court asked defendant's trial counsel if there was any objection to the admission of the exhibit, trial counsel stated that the matter had been stipulated and defendant pled guilty to the driving while license revoked charge before trial. Evidence of defendant's driving record which was produced at trial showed numerous violations and suspensions for failure to appear, as well as convictions for driving without a license and driving while his license was revoked.

The court followed the pattern jury instructions on felony serious injury by vehicle and gave the jury separate instructions on impaired driving, the second element of felony serious injury by vehicle. With regard to felony serious injury by vehicle, the jury instructions provided, in pertinent part, the following:

The Defendant has been charged with five counts of felonious serious injury by vehicle. For you to find the Defendant guilty of this offense, the State must prove four things beyond a reasonable doubt. First, that the Defendant was driving a vehicle. Second, that he was driving the vehicle upon a highway or street within the state. Third, that at the time the Defendant was driving that vehicle he was under the influence of an impairing substance.

Alcohol is an impairing substance. The defendant is under the influence of an impairing substance when the Defendant has taken or consumed a sufficient quantity of that impairing substance that caused the Defendant to lose a normal control of Defendant's bodily or mental faculties or both to such an extent that there is an appreciable impairment of either or both of these faculties; or had consumed sufficient alcohol that any relevant

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time after the driving the Defendant had an alcohol concentration of 0.08 or more grams of alcohol per 210 liters of breath per 100 milliliters of blood, at a relevant time after driving, that Defendant still had in his body . . . alcohol consumed before or during the driving. The results of a chemical analysis are deemed sufficient evidence to prove a person's alcohol concentration.

The court instructed the jury in the following manner with regard to the charge of driving while impaired:

For you to find Defendant guilty of [driving while impaired] the State must prove three things beyond a reasonable doubt. First, the Defendant was driving a vehicle. Second, that the Defendant was driving that vehicle upon a highway or street within the state. Third, at the time the Defendant was driving the vehicle the Defendant was under the influence of an impairing substance.

As I previously said, alcohol is an impairing substance. The Defendant is under the influence of an impairing substance when the Defendant has taken or consumed a sufficient quantity of that impairing substance to cause the Defendant to lose the normal control of the Defendant's bodily or mental faculties or both to such an extent that there is an appreciable impairment of either or both of these faculties or had consumed sufficient alcohol that at any relevant time after the driving the Defendant had an alcohol concentration of 0.08 or more grams of alcohol per 210 liters of breath.

A relevant time is any time after the driving that the driver still has in the body alcohol consumed before or during the driving. The results of a chemical analysis are deemed sufficient evidence to prove a person's alcohol concentration.

The court did not instruct the jury that in order to find defendant guilty of felony serious injury by vehicle, they must first find the lesser offense, driving while impaired. The jury found defendant not guilty of driving while impaired, but guilty with regard to the charges of misdemeanor hit and run and the five counts of felony serious injury by vehicle.

Defendant's trial counsel made a motion to dismiss at the close of the State's evidence and at the conclusion of all evidence, as well as a motion to set aside the jury verdicts for the five counts of felony serious injury by vehicle. With regard to defendant's motion to set aside the five counts of felony serious injury by vehicle, defendant

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solely argued that the jury's verdict of not guilty on the charge of driving while impaired was legally inconsistent with the jury's verdict of guilty on the five counts of felony serious injury by vehicle, because driving while impaired is an element of felony serious injury by vehicle. The trial court denied all of defendant's motions. In addition, the State submitted a restitution worksheet to the court alleging defendant owed \$228,043.84 in restitution based upon the injuries the victims sustained in the incident. Defendant's trial counsel noted that the amount of restitution was substantial and that insurance associated with the Cadillac defendant drove on the night of the incident covered some of the restitution amount. Defendant's trial counsel further noted that the victims received insurance payments to cover some of the medical expenses. Moreover, defendant's trial counsel said defendant has an opportunity to be placed on probation because defendant did not have prior felony convictions and did not intend to harm the victims. Both the State's and defendant's trial counsel agreed that insurance payments needed to be included in the restitution amount and the trial court ordered judgment for restitution to be rendered against defendant. Defendant now appeals the judgments entered by the trial court.

**II. Issues Presented on Appeal**

On appeal, defendant asserts that the trial court erred in the following manner: (1) in allowing the introduction of defendant's DMV driving record at trial when he had previously pled guilty to driving while license revoked and is not contesting that charge; (2) in denying defendant's motion to dismiss the five counts of felony serious injury by vehicle; (3) in denying defendant's motion to set aside the five convictions of felony serious injury by vehicle given that the evidence was insufficient to support the convictions because the jury's verdict of not guilty on the driving while impaired charge negated an essential element necessary to support the felony serious injury by vehicle convictions under N.C. Gen. Stat. § 20-141.4(a3); and (4) in ordering defendant to pay restitution in the amount of \$228,043.84. We decline to address defendant's first assignment of error regarding the introduction of defendant's DMV driving record due to our resolution of the remaining issues.

**III. Denial of Defendant's Motion to Dismiss**

[1] Defendant contends that the trial court erred in denying his motion to dismiss the charges of felony serious injury by vehicle because there was insufficient evidence that defendant was driving while impaired at the time of the incident in question. We disagree.

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In ruling on a motion to dismiss in a criminal case, the Court must determine whether or not there is substantial evidence to support each element of the crime that is being charged. *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980). “ ‘Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.’ ” *State v. Turnage*, 362 N.C. 491, 493-94, 666 S.E.2d 753, 755 (2008) (citation omitted). The Court “ ‘must consider the evidence in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn from that evidence.’ ” *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 926 (1996) (quoting *State v. Saunders*, 317 N.C. 308, 312, 345 S.E.2d 212, 215 (1986)). If more than a scintilla of evidence is presented to support the indictment, the case must be submitted to the jury. *State v. Kelly*, 243 N.C. 177, 90 S.E.2d 241 (1955).

Evidence of defendant’s impairment is required under N.C. Gen. Stat. § 20-141.4(a1) driving while impaired and -(a3) driving while impaired causing serious injury, before these charges may be submitted to a jury. In this case, defendant contends that the evidence was insufficient due to the almost three-hour lapse in time between the incident at approximately 12:31 a.m. and the administration of the intoxilyzer test at 3:47 a.m. At that time the intoxilyzer test registered defendant’s blood alcohol concentration at .09. Although defendant admits that he was probably intoxicated at the time of the intoxilyzer test, he denies being intoxicated at the time of the incident. During the trial, defendant asserted that he drank part of a beer after the incident, and he attributed his higher blood alcohol concentration at the time of the test to his drinking after the occurrences.

The State relies on Trooper Beamon’s observations and Captain Davenport’s testimony to conclude that there was substantial evidence for the jury to determine that defendant was impaired at the time of the accident. The State contends that Trooper Beamon administered the intoxilyzer test after noticing that defendant was impaired. Further, Trooper Beamon projected that after the incident, the drop in defendant’s alcohol level would be .06, and three hours earlier the alcohol level would have been .15. The accident report indicated that the accident occurred at approximately at 12:31 a.m. In addition, while being questioned by Captain Davenport, defendant made a written statement explaining that after the incident he got beer from the Cadillac and took two or three big swallows of beer and put it back in the car. Moreover, before the incident, defendant drank a 32-ounce beer, had a shot of liquor, and had two more swallows of beer.

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On appeal, defendant only contends that the evidence was insufficient to submit to the jury the issue of whether defendant was driving while impaired. Defendant does not dispute the sufficiency of evidence with regard to the other elements of the offense. With regard to defendant's motion to dismiss, the ultimate question is merely whether there was sufficient evidence to support each essential element of the crime charged, not whether defendant is ultimately acquitted or convicted. *See Crawford*, 344 N.C. at 73, 472 S.E.2d at 925. Therefore, viewing the evidence in the light most favorable to the State, we hold that the State's evidence was sufficient for a reasonable juror to conclude that defendant was impaired at the time of the incident.

**IV. Denial of Defendant's Motion to Set Aside the Convictions of Felony Serious Injury by a Vehicle**

[2] In his brief on appeal, defendant assigns error to the denial of his motion to dismiss and set aside the jury's convictions on five counts of felony serious injury by vehicle on the grounds that the jury's verdict of "not guilty" of the driving while impaired charge negated an essential element necessary to support a conviction of felony serious injury by vehicle. In his principal brief defendant argues that the proper remedy is to vacate the five convictions of felony serious injury by vehicle. However, defendant's reply brief requests that this Court reverse all five convictions.

In his principal brief and in his reply brief, defendant argues two theories: (1) the verdicts are inconsistent and (2) both federal and state double jeopardy clauses are implicated. A review of the record, however, discloses that, while defendant did object to the alleged inconsistent jury verdicts, he did not object to the verdicts on double jeopardy grounds. Our courts have held these assignments of error to be distinct, separate objections which must be first presented to the trial court to be preserved. N.C. R. App. P. 10(a); *see State v. Short*, 322 N.C. 783, 790, 370 S.E.2d 351, 355 (1988); *see also Forsyth County Hosp. Auth.*, 82 N.C. App. at 346, 346 S.E.2d at 212. We therefore only consider defendant's first theory, inconsistent verdicts, which was properly preserved by timely objection. This issue presents a question of law, which is reviewed *de novo*. *See State v. Barnhill*, 166 N.C. App. 228, 601 S.E.2d 215 (2004).

Our courts have long held that we should not disturb seemingly inconsistent jury verdicts where there is sufficient evidence to convict adduced at trial and "[t]he apparent inconsistency may well be

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explained by an examination of the record as a whole.” *State v. Davis*, 214 N.C. 787, 793-94, 1 S.E.2d 104, 108 (1938). In *Davis*, the jury acquitted the defendant of possession of intoxicating liquor for sale, but convicted the defendant of transportation of intoxicating liquor with intent to sell. *Id.* at 787, 1 S.E.2d at 105. Both verdicts require the defendant to have possessed liquor; therefore, the defendant’s acquittal and conviction appear to be logically inconsistent. The Court justified this apparent inconsistency by explaining that the evidence produced at trial tended to “indicate[] that this defendant was transporting [the liquor] for another.” *Id.* at 794, 1 S.E.2d at 108. However, the Court further provided that despite the evidence, the jury “[s]eemingly [] was unwilling to convict the defendant of possession for the purpose of sale[.]” *Id.* The Court upheld the defendant’s conviction and noted, “mere inconsistency will not invalidate the verdict.” *Id.*; see *State v. Cole*, — N.C. App. —, 681 S.E.2d 423 (2009) (upholding a defendant’s conviction of assault with a deadly weapon and acquittal of possessing the weapon); see also *State v. Brown*, 36 N.C. App. 152, 242 S.E.2d 890 (1978) (upholding defendant’s conviction for sale of a controlled substance where the jury acquitted defendant of one charge as an aider and abetter of the principal). These verdicts are logically inconsistent and yet can be explained by jury lenity or by a review of the record.

Our Supreme Court extended the *Davis* reasoning to inconsistent verdicts among co-principals. In *State v. Beach*, 283 N.C. 261, 269, 196 S.E.2d 214, 220 (1973), *overruled on other grounds by State v. Adcock*, 310 N.C. 1, 310 S.E.2d 587 (1984), the Court held that prior acquittal of one mistakenly supposed to have committed a crime does not affect the guilt of one proven to have been present aiding and abetting, so long as it is established that the crime was committed by someone. In *State v. Reid*, 335 N.C. 647, 440 S.E.2d 776 (1994), the Court extended *State v. Beach*, 283 N.C. 261, 196 S.E.2d 214 (1973), to inconsistent verdicts in the same trial. In *Reid*, our Supreme Court found the logic of the United States Supreme Court’s views on inconsistent verdicts as expressed in *Dunn v. United States*, 284 U.S. 390, 76 L. Ed. 356 (1932) and *United States v. Powell*, 469 U.S. 57, 83 L. Ed. 2d 461 (1984), to be persuasive. In *Reid*, the Court noted the following:

[I]f the jury did believe that [the defendants] Adams and Reid were acting in concert, then it could have also convicted Reid of the murder of Wilkes. The jury’s decision to acquit Reid on this crime may have been a demonstration of compromise or lenity

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for Reid. A case such as this, where the evidence, even among the witnesses for each side, is contradictory and confusing, is a prime example of why we should not attempt to enter the jury's thought process to determine whether the jurors spoke their real conclusions in their conviction of Reid for assault, acquittal of Reid for murder, conviction of Adams for murder, or acquittal of Adams for assault. What we have done to protect defendant Reid from an irrational jury is determine if the evidence was sufficient to find defendant guilty of assault with a deadly weapon with intent to kill inflicting serious injury beyond a reasonable doubt. We have concluded that viewing the evidence in the light most favorable to the State, the jury could have determined that defendant Reid was acting in concert with defendant Adams and found him guilty under this theory. Reid's conviction will not be reversed on the ground that there were inconsistent verdicts in his trial.

*Reid*, 335 N.C. at 660-61, 440 S.E.2d at 783.

Another variation of the inconsistent verdict is verdicts which are logically inconsistent in that the evidence supports conviction on multiple counts and yet defendant is acquitted on some charges and convicted on others. *See State v. Shaffer*, — N.C. App. —, 666 S.E.2d 856 (2008), *disc. review denied*, 363 N.C. 137, 674 S.E.2d 418 (2009). The State asserts that the use of the reasoning of *Dunn* and *Powell* by our Supreme Court in *Reid* has the judicial effect of holding that inconsistent verdicts can no longer be the basis of appeal in criminal cases. This assertion is overbroad and misreads *Reid* which applied this reasoning to extend the State's holding in *Beach* only to conviction and acquittal of codefendants in the same trial.

The general rule of inconsistent verdicts has exceptions for contradictory verdicts—verdicts in which conviction requires a jury to find guilt of mutually contradictory elements. *State v. Marsh*, 187 N.C. App. 235, 652 S.E.2d 744 (2007), addresses this issue. In *Marsh*, the defendant was charged with three criminal offenses including felonious possession of stolen goods. *Id.* at 241, 652 S.E.2d at 747. A conviction of felonious possession of stolen goods requires the State to prove, as an essential element, that either “(1) the property stolen had a value of more than \$1,000.00, or (2) that the property was stolen pursuant to a breaking or entering.” *Id.* at 241, 652 S.E.2d at 747-48. On this issue, the trial court in *Marsh* instructed the jury “solely on the theory that the property was stolen pursuant to a breaking and entering”; the jury was not instructed as to the value of the property. *Id.* at 241-42, 652 S.E.2d at 748. Based on the trial court's instruction,

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the jury found the defendant guilty of felonious possession of stolen goods, but not guilty of breaking and entering. On those facts, our Court held the following:

Since the jury found defendant not guilty of the charge of breaking or entering, and the indictment for felonious possession of stolen goods specifically referred to defendant having committed the breaking and entering, defendant cannot be guilty of felonious possession of stolen goods, but only of misdemeanor possession of stolen goods.

The Court concluded that the judgment of felony possession of stolen goods must be vacated. *Id.* at 245, 652 S.E.2d at 750.

Similar inconsistent verdicts occur when a jury mistakenly convicts a defendant of mutually exclusive crimes. *See State v. Byrd*, 122 N.C. App. 497, 498, 470 S.E.2d 548, 549 (1996) (holding that “the acquittal of a *named* principal at a *separate* trial requires acquittal of one charged as an aider and abetter of that named principal”); *State v. Speckman*, 326 N.C. 576, 578, 391 S.E.2d 165, 167 (1990) (holding that convicting defendant of embezzlement and obtaining property by false pretenses, both of which arose from the same transaction, is illegal because “property cannot be obtained simultaneously pursuant to both lawful and unlawful means”); *State v. Hames*, 170 N.C. App. 312, 612 S.E.2d 408 (2005) (holding that jury verdicts of assault with a deadly weapon with intent to kill and voluntary manslaughter are logically inconsistent because “[b]oth views cannot exist at the same time’”) (citation omitted); *State v. Goblet*, 173 N.C. App. 112, 121, 618 S.E.2d 257, 264 (2005) (holding that, “when a charge of felony possession of stolen goods is based on the goods having been stolen pursuant to a breaking and entering a court cannot properly accept a guilty verdict on the charge of felony possession of stolen goods when defendant has been acquitted of the breaking and entering charge”); *State v. Hall*, 104 N.C. App. 375, 410 S.E.2d 76 (1991) (holding that, where the jury returns guilty verdicts on the mutually exclusive offenses and the trial court consolidates the offenses for a single judgment, the defendant is entitled to a new trial).

The jury outcome in this case falls within this logically inconsistent *and* legally contradictory exception. To convict a defendant of felony serious injury by a vehicle, the defendant must also be guilty of driving while impaired. *See* N.C. Gen. Stat. § 20-141.4(a3)(2); *see also* N.C. Gen. Stat. § 20-141.4(a1)(2). Defendant was indicted for both crimes arising from the same transaction or occurrences.

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Normally this logically inconsistent verdict would fall within the *Shaffer* line of cases showing jury lenity or confusion. However, the elements of the greater crime (felony driving while impaired causing serious injury) statutorily require conviction of the lesser crime (driving while impaired).

In the jury charge, the trial judge instructed first on the elements of driving while impaired causing serious injury and then on the elements of impaired driving. The charge under our pattern instructions requires that the elements of impaired driving be repeated in both instructions; however, the instructions do not inform the jury that the statute requires a conviction on the offense of driving while impaired in order to convict the defendant of felony serious injury by vehicle. *See* N.C. Gen. Stat. § 20-141.4(a3).

The statute's language should normally not produce an inconsistent verdict where the evidence supports a finding of impaired driving on both charges. The issue in this fact pattern was central to the prosecution and defense and clearly a question of fact requiring jury resolution. Had the jury convicted on both offenses, there is clearly no logical inconsistency. In this instance, the judge would sentence on the greater charge and arrest judgment on the lesser charge. *See State v. Marshall*, 188 N.C. App. 744, 656 S.E.2d 709, *disc. review denied*, 362 N.C. 368, 661 S.E.2d 890 (2008). If the jury acquits on the greater offense and convicts on the lesser offense, then the verdict is logically consistent because the element of serious injury is not found. However, when a jury convicts of the greater charge and acquits on the lesser charge, then a logically inconsistent and legally contradictory verdict results. This last result could be avoided by instructing the jury not to address the lesser charge in the event the jury convicts on the greater charge. This option was not available to the trial judge because the judge is required to instruct on both charges if both charges are present in the indictment. An alternative would be to instruct the jury that in order to convict of the greater charge, they must find the defendant guilty of the lesser charge. Neither option is contained within the current pattern instructions.

This statutory offense is problematic, and in this case, resulted in an inconsistent and contradictory verdict that cannot be explained by resort to the record as in *Davis*, and cannot be dismissed as jury leniency as in *Reid*. The defendant was either impaired under N.C. Gen. Stat. § 20-138.2, driving while impaired, or not. Both views cannot exist at the same time. We hold that jury verdicts convicting defendant of felony driving while impaired inflicting serious injury

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and acquitting defendant of driving while impaired are inconsistent and contradictory; thus, the trial court should have declined to accept the verdicts, reinstructed the jury, and directed it to retire and deliberate further. *See State v. Abraham*, 338 N.C. 315, 359, 451 S.E.2d 131, 155 (1994); N.C. Gen. Stat. § 14-17 (2007); *see also* 75B Am. Jur. 2d *Trial* § 1558 (2009). Based upon the foregoing, we vacate the jury verdicts in the five counts of felony serious injury by vehicle and DWI.

**V. Restitution**

[3] Lastly, defendant asserts that the trial court erred in ordering him to pay restitution in the amount of \$228,043.84 for the convictions of misdemeanor hit and run and driving while license revoked. Defendant contends that he did not agree or stipulate to the amount of restitution and that the evidence is insufficient to justify the restitution award. We agree.

Sentencing or judgment entered upon a defendant's conviction is reviewed *de novo* by this Court. *N.C. Dep't of Env't. & Natural Res. v. Carroll*, 358 N.C. 649, 599 S.E.2d 888 (2004). This Court in *State v. Replogle*, 181 N.C. App. 579, 584, 640 S.E.2d 757, 761 (2007), noted that silence does not equate to stipulation; the stipulation must be definite and certain. " '[T]he amount of restitution recommended by the trial court must be supported by evidence adduced at trial or at sentencing.' The unsworn statement of the prosecutor is insufficient to support the amount of restitution ordered." *State v. Shelton*, 167 N.C. App. 225, 233, 605 S.E.2d 228, 233-34 (2004) (citation omitted).

During the sentencing hearing, the following dialogue ensued:

The Court: . . . The Court orders that judgment be rendered against the Defendant in the amount of \$228—\$228,043.84. Is this the amount that does not include insurance payments?

Mr. Rogerson: It does not, Your Honor.

Mr. Muskus: It does, Judge, that's actually, Ms. Tyndall—

Mr. Rogerson: We verified that?

Mr. Muskus: It does.

Mr. Rogerson: Okay. All right, that's fine.

The Court: Okay. Judgment in the amount of \$228,043.84.

The words of defendant's trial counsel did not equate to mere silence. However, trial counsel's statement may not be seen as a "def-

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[201 N.C. App. 607 (2010)]

inite and certain” stipulation “to afford a basis for judicial decision.” *State v. Alexander*, 359 N.C. 824, 826, 616 S.E.2d 914, 916 (2005). Moreover, the restitution amount must be supported by some evidence at trial and must show the appropriate amount. *See State v. Davis*, 167 N.C. App. 770, 776, 607 S.E.2d 5, 10 (2005). The record only notes that restitution worksheets were being submitted to the court; however, it does not reflect the convictions for which the sheets were submitted. Consequently, this portion of the judgment is vacated.

**VI. Conclusion**

For the reasons stated herein, we hold that the trial court erred in denying defendant’s motion to set aside the five convictions for felony serious injury by vehicle and in ordering defendant to pay restitution in the amount of \$228,043.84.

Vacated.

Judges STEPHENS and BEASLEY concur.

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STATE OF NORTH CAROLINA v. STEVIE CHARLES HENSLEY, DEFENDANT

No. COA08-1485

(Filed 5 January 2010)

**1. Sexual Offenses— minor—sufficiency of findings of fact— conclusions of law**

The findings of fact relevant to the trial court’s conclusions of law in a sexual offense with a minor case were supported by competent evidence in the record.

**2. Confessions and Incriminating Statements— custody—failure to advise of *Miranda* rights**

The trial court did not err by suppressing defendant’s statements to a detective because defendant was in custody and subjected to interrogation without advisement of his *Miranda* rights at the time he made the statements when the conversation did not remain in the nature of general conversation, but instead moved to defendant’s cooperation with the investigation and to comments which were reasonably likely to elicit an incriminating response.

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[201 N.C. App. 607 (2010)]

Appeal by the State from order entered 31 July 2008 by Judge Abraham Jones in Superior Court, Alamance County. Heard in the Court of Appeals 18 August 2009.

*Attorney General Roy A. Cooper, III, by Assistant Attorney General Amy C. Kunstling, for the State.*

*Paul F. Herzog, for defendant-appellant.*

STROUD, Judge.

This matter is before the Court on the State's appeal from a trial court order allowing Stevie Charles Hensley's ("defendant") motion to suppress statements made on 3 September 2005 to Detective Michael Enoch of the Alamance County Sheriff's Department. The issue presented to this Court for review is whether defendant was, for *Miranda* purposes, subject to interrogation at the time he made incriminating statements to Detective Enoch. For the following reasons, we affirm.

### I. Background

The State's evidence tended to show the following: In September of 2005, Michael Enoch was a detective with the criminal investigations division of the Alamance County Sheriff's Department. On 2 September 2005, Detective Enoch was conducting an initial investigation of allegations of a sexual offense with a minor and had scheduled a time to talk with defendant about those allegations. Defendant did not show up at the scheduled time. Approximately forty-five minutes to an hour after the scheduled time, Detective Enoch received a call from Central Communications dispatch that defendant was in the emergency room at Alamance Regional Medical Center. Detective Enoch went to the hospital that same day and learned that defendant had attempted to overdose, was in the hospital's intensive care unit, and would remain in the hospital at least overnight. Detective Enoch did have an opportunity to talk briefly to defendant, telling him to take care of this medical issue and they would talk later. Detective Enoch stated that he "couldn't tell if [defendant] was just medicated or what" but defendant was coherent. Detective Enoch told the hospital staff to inform him when defendant was ready to be released. The following afternoon, on 3 September 2005, Detective Enoch received a phone call from the hospital stating that defendant was going to be released.

Defendant's contentions raised in his motion to suppress arise from Detective Enoch's contact and discussions with him at the hos-

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pital on 3 September 2005 and upon leaving the hospital. We will review the evidence in regard to these contentions in detail below.

On 4 December 2006, defendant was indicted for first degree statutory sexual offense and taking indecent liberties with a child. On 22 July 2008, defendant moved to suppress statements and responses made by defendant on 3 September 2005 to Detective Michael Enoch. Following a suppression hearing on 28 July 2008, the trial court orally granted defendant's motion and entered a written order on 31 July 2008, making findings of fact and conclusions of law. The State gave oral notice of appeal in open court and filed written notice of appeal on 1 August 2008.

## II. Motion to Suppress

When evaluating a trial court's ruling on a motion to suppress, its findings of fact will be binding on appeal if supported by competent evidence. *State v. Barden*, 356 N.C. 316, 332, 572 S.E.2d 108, 120-21 (2002), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003). The trial court's findings of fact must support the conclusions of law, *State v. Tadeja*, 191 N.C. App. 439, 443, 664 S.E.2d 402, 406-07 (2008), and the conclusions of law are reviewable *de novo*. *State v. Icard*, 363 N.C. 303, 308, 677 S.E.2d 822, 826 (2009) (citation omitted). Our Appellate Courts "accord[] great deference to the trial court in this respect because it is entrusted with the duty to hear testimony, weigh and resolve any conflicts in the evidence, find the facts, and, then based upon those findings, render a legal decision . . . ." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619-20 (1982).

[1] The State contends that the trial court's findings of fact nine, twelve, fourteen, fifteen, eighteen, nineteen, twenty-one, and twenty-two are not supported by competent evidence in the record. As only some of these findings are relevant to the trial court's ultimate conclusion regarding the defendant's statements to Detective Enoch on 3 September 2005, we will address only those findings. We treat findings of fact which do not add to nor take away from the trial court's ultimate conclusion as mere surplusage. *See State v. King*, 222 N.C. 137, 141, 22 S.E.2d 241, 244 (1942) (Evidence that "would neither add to nor take from the sufficiency of the proceedings" would be treated as mere surplusage by the appellate court.).

The trial court in its order made the following relevant findings contested on appeal:

15. After a considerable amount of time waiting for the hospital to discharge the Defendant, Detective Enoch eventually took

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Defendant into custody, arrested him, and placed him into the patrol car. The Defendant was taken from the hospital in a wheelchair and the detective acknowledged that he needed to assist the Defendant out of the wheelchair and help him into the back seat of the patrol car. Detective Enoch was not sure whether the Defendant was still groggy mentally from the suicide attempts and medications he received or if he was just very stiff from having been laying in bed on his back for more than twenty-four hours.

. . . .

18. Detective Michael Enoch acknowledged that sometime during that conversation he did say something to the effect to the Defendant that what he had to say was not going to be on the record and that he would hope that the Defendant would continue to cooperate even though he had been arrested; and, the detective inquired whether or not the Defendant would agree to speak with him the next day which would have been Sunday, September 4, 2005, if Detective Enoch came in to work overtime to get a statement from him.

19. Detective Enoch indicated that he knew the Defendant from prior dealings when he investigated an alleged child molestation case involving a Michael Thompson against the same victim, K.G. the year before; and that the Defendant was alert and oriented during that investigation; that he spoke with the Defendant on or about July 12, 2005 and the Defendant appeared to be in a sober state and alert and not disoriented at that conversation but when he contacted the Defendant on September 2, 2005 the Defendant was very disoriented and talking like he was on medication; and, that on September 3, 2005 the Defendant was not talking as clearly as he had on those other previous contacts that the officer had with him but that he was responsive to his general statements and comments to the Defendant.

. . . .

22. That the Defendant allegedly made the statement, 'Mike I do not want you to think that I am a bad person, but I do not find anything sexual about children, but I was drinking very heavily and smoking pot and I guess the combination of the two will make a guy do something he normally would not do[.]'

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After a thorough review of the record, we hold that the findings of fact relevant to the trial court's conclusions are supported by competent evidence in the record.

Detective Enoch testified that he knew defendant from a previous case and had interviewed defendant on two prior occasions. As a result, Detective Enoch had established a rapport with defendant.

On 3 September 2005, when Detective Enoch went to the hospital to serve arrest warrants on defendant and take him into custody, he had to wait for defendant to be released from the hospital. At the hospital, Detective Enoch spoke to defendant, telling him that he "was really concerned about his health, [and] . . . there was no problem [defendant] could have that would be worth trying to take his own life." Detective Enoch then told defendant that he was going to be charged with the offenses on the arrest warrant, first degree statutory sexual offense and sex offense in a parental role. Defendant asked Detective Enoch to explain the situation to his parents, and Detective Enoch did so. When defendant was ready to be released from the hospital, Detective Enoch took defendant into custody. Detective Enoch testified that defendant seemed "a little weak" and "a little medicated," enough so that Detective Enoch had to help defendant into his patrol car. Detective Enoch did not advise defendant of his *Miranda* rights when he took him into custody. Detective Enoch transported defendant to the Sheriff's Department. While waiting for defendant to be released from the hospital and on the way to the Sheriff's Department, Detective Enoch and defendant had "[a] lot of casual conversation." Detective Enoch told the defendant he "was glad he was feeling better" and "was glad he didn't succeed in trying to kill himself." Detective Enoch admitted that on the drive to the Sheriff's Department, defendant still seemed "a little medicated" but still "very coherent" and "understood what was going on." Detective Enoch explained to defendant that he wanted to talk with defendant, but due to his family obligations, he could not that day. Detective Enoch told defendant that he was not even going to advise defendant of his rights; "did not want to talk to [defendant] about anything[;]" "did not want to go on the record with anything[;]" they were not talking about the case; but were just going to take care of the paperwork. Detective Enoch then told defendant "that [he] was in trouble with [his] wife for having to come in to work [on] a Saturday afternoon." Detective Enoch explained that "I would sometimes use the I should be at home with my family but I'm here having to talk to you to build the rapport[,] to let them know that I felt like talking to them was

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important.” Defendant “at some point actually apologized one time for [Detective Enoch] having to leave [his] family event to come get [defendant].” Detective Enoch also informed defendant that he would tell the prosecutor if defendant was cooperative with the investigation. Detective Enoch followed up by asking defendant “if he wanted [Detective Enoch] to come back the next day[.]” Defendant responded by stating that “at the time that he just didn’t want [Detective Enoch] to think that he was a bad person, that when you start drinking alcohol and smoking marijuana you do things you normally would not do.” Defendant then told Detective Enoch that he would talk further with him on the following day.

Detective Enoch explained that it was not his intent in the car on the way to the Sheriff’s Department to get defendant to confess. Detective Enoch stated that it was his

sole intent . . . to find out if [he] needed to come back the next day on a Sunday and get the overtime. At that time the Sheriff’s Department was kind of cracking down on overtime. [Detective Enoch] didn’t want to, frankly, come into work if defendant was not going to talk to [him].

On Sunday, 4 September 2005, Detective Enoch went in to work to interview defendant. Detective Enoch read defendant his *Miranda* rights and defendant stated that he did not want to talk to Detective Enoch without a lawyer. Detective Enoch confirmed that when he saw defendant in the hospital on 2 September 2005, defendant seemed medicated or drugged. The next day, 3 September 2005, defendant seemed more responsive. On 4 September 2005, defendant seemed the most responsive and clearest when Detective Enoch read defendant his *Miranda* rights and he refused to talk without first speaking to an attorney. Detective Enoch stated that while he was taking defendant to the Sheriff’s Department on 3 September 2005, defendant did not appear to be so “intoxicated” as to not know what he was doing or completely incoherent as to not understand what was going on around him.

Jean Usher (“Ms. Usher”) a registered nurse at Alamance Regional Medical Center testified that she was working in the emergency room on 2 September 2005, where she saw defendant as a patient. Ms. Usher stated that defendant presented as drowsy and hard to arouse, and he did not spontaneously answer her questions. Ms. Usher gave defendant a sternal rub, checking his responsiveness by rubbing her knuckles across his sternum. After the sternal rub,

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defendant became responsive and answered her questions. Ms. Usher described defendant's condition after the sternal rub as conscious but disoriented. Defendant told Ms. Usher that he took a bottle of Xanax and had beer that day, but he didn't remember how much. Ms. Usher saw the empty Xanax bottle, which was dated September 2nd and the prescription was for forty pills. Defendant also stated that he took the antidepressant Zoloft, Prevacid, and the sleeping pill Halcion. Defendant was given Romazicon to counter the effects of Xanax, and Ms. Usher stated that it usually does not take long to work.

Defendant testified that on 2 September 2005 he attempted suicide by taking forty Xanax pills and then drinking a six-pack of beer. Defendant testified that he had a prescription for Zoloft for depression, and Halcion, a sleeping pill. After taking the Xanax, defendant shot a rifle in the air two or three times, and he did not remember anything until the next day when he was in the hospital. Defendant stated that he did not "remember a lot of anything from—actually through the 3rd, everything is kind of hazy and everything was pretty clear when I woke up in jail on the 4th." Defendant stated that on the 3rd before he was released from the hospital that he remembered people coming into his intensive care room and talking to him but he did not really remember what was discussed. Defendant said that he "[v]aguely" remembered going to jail in the police car but stated that he remembered Detective Enoch telling him "off the record, I can help you if you'll work with me. I can get you a lighter sentence." Defendant stated that while riding in the car he "felt hazy, groggy. Kind of like when you've been asleep for a long time and you wake up, and . . . you can't take in everything all at one time." Defendant stated that he did not remember saying to Detective Enoch, "I don't want you to think I'm, you know, a person who gets sexual interest in children."

As the trial court's relevant findings of fact are supported by competent evidence in Detective Enoch's testimony about his interactions and conversations with defendant on September 2nd and 3rd and the testimony of Ms. Usher and defendant, they are binding on appeal. *Barden*, 356 N.C. at 332, 572 S.E.2d at 120-21. The remaining findings of fact not challenged on appeal "are deemed to be supported by competent evidence and are binding on appeal." *State v. McLamb*, 186 N.C. App. 124, 125, 649 S.E.2d 902, 903 (2007) (citation and quotation marks omitted), *disc. review denied*, 362 N.C. 368, 663 S.E.2d 433 (2008). The State's assignments of error as to the trial court's findings of fact are overruled.

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[2] The State next contends that the findings of fact do not support the trial court's conclusion that (1) a reasonable officer would expect defendant to give a response to Detective Enoch's comments to defendant; (2) this statement by the defendant was made as a result of custodial interrogation by Detective Enoch; (3) Detective Enoch's statements were made to elicit an incriminating response and are therefore interrogation; (4) Detective Enoch elicited defendant's incriminating response; and (5) Defendant was subjected to interrogation without being advised of his *Miranda* rights.

Although the State identifies all of these statements as conclusions of law, some are findings of ultimate fact and are supported by the findings of fact as discussed above and some are conclusions of law. Our Supreme Court has stated that

[u]ltimate facts are those found in that vaguely defined area lying between evidential facts on the one side and conclusions of law on the other. (Citations omitted.) In consequence, the line of demarcation between ultimate facts and legal conclusions is not easily drawn. (Citation omitted.) An ultimate fact is the final resulting effect which is reached by processes of logical reasoning from the evidentiary facts. (Citations omitted.) Whether a statement is an ultimate fact or a conclusion of law depends upon whether it is reached by natural reasoning or by an application of fixed rules of law. (Citations omitted.)

*Quick v. Quick*, 305 N.C. 446, 451-52, 290 S.E.2d 653, 657-58 (1982) (citation and quotation marks omitted). " '[A]s a general rule, . . . any determination requiring the exercise of judgment or the application of legal principles is . . . properly classified a conclusion of law.' " *State v. Sparks*, 362 N.C. 181, 185, 657 S.E.2d 655, 658 (2008) (citation omitted). Here, the only identified "conclusion" that requires application of law is that Detective Enoch elicited the incriminating statements from defendant by custodial interrogation. The remaining "conclusions" identified by the State are ultimate facts upon which the above conclusion of law is based. The remaining analysis will address the legal conclusion that Detective Enoch elicited the incriminating statements from defendant by custodial interrogation.

A defendant's statement made "from custodial interrogation [is] admissible at trial only if, prior to questioning, the defendant has been fully advised of his rights to remain silent and to have counsel present during questioning. " *State v. Braxton*, 344 N.C. 702, 708, 477 S.E.2d 172, 175 (1996) (citing *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d

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694 (1966)). “The *Miranda* Court defined ‘custodial interrogation’ as ‘questioning initiated by law enforcement officers after a person has been taken into custody or deprived of his freedom of action in any significant way.’ ” *State v. Crudup*, 157 N.C. App. 657, 659, 580 S.E.2d 21, 24 (2003) (quoting *Miranda*, 384 U.S. at 444, 16 L. Ed. 2d at 706). The trial court’s third conclusion of law states that defendant was in custody for *Miranda* purposes at the time he made the incriminating statements to Detective Enoch and the State at trial and in its brief does not challenge this conclusion. Therefore, the issue in this case is whether defendant was, for *Miranda* purposes, subjected to interrogation at the time he made incriminating statements to Detective Enoch.

Our Supreme Court has held that “[t]he term ‘interrogation’ is not limited to express questioning by law enforcement officers, but also includes ‘any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.’ ” *State v. Golphin*, 352 N.C. 364, 406, 533 S.E.2d 168, 199 (2000) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 64 L. Ed. 2d 297, 308 (1980)), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001).

The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police.

*Innis*, 446 U.S. at 301, 64 L. Ed. 2d at 308. “However, the intent of the police is relevant, ‘for it may well have a bearing on whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response.’ ” *State v. Washington*, 102 N.C. App. 535, 538-40, 402 S.E.2d 851, 853-55 (1991) (Greene, J., dissenting) *rev’d per curiam* by 330 N.C. 188, 410 S.E.2d 55-56 (adopting J. Greene’s dissent). Other factors relevant to the determination of whether police ‘should have known’ their conduct was likely to elicit an incriminating response include: “whether the ‘practice is designed to elicit an incriminating response from the accused[;]’ ” and “ ‘[a]ny knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion . . . .’ ” *State v. Fisher*, 158 N.C. App. 133, 143, 580 S.E.2d 405, 413 (2003) (quoting

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*Innis*, 446 U.S. at 302, 64 L. Ed. 2d at 308 (1980) (fn. 7, 8)), *aff'd per curiam*, 358 N.C. 215, 593 S.E.2d 583 (2004). "Interrogation may take the form of either express questioning or its functional equivalent." *Washington*, 102 N.C. App. at 539, 402 S.E.2d at 854 (citation and quotation marks omitted).

The findings of fact support the trial court's conclusion that defendant was subjected to interrogation and made his incriminating statements in response to the interrogation. As to whether Detective Enoch 'should have known' his conduct was likely to elicit an incriminating response from defendant, the trial court's findings of fact support that Detective Enoch's conduct may have been designed to elicit an incriminating response from the accused. *Fisher*, 158 N.C. App. at 143, 580 S.E.2d at 413. After telling the defendant that their conversation was not going to be "on the record[,] " Detective Enoch moved the conversation to the topic of defendant's cooperation with the investigation. *See State v. Rollins*, 189 N.C. App. 248, 262, 658 S.E.2d 43, 52 (2008), *reversed on other grounds by*, 363 N.C. 232, 675 S.E.2d 334 (2009) (The trial court held that an officer's question was reasonably likely to elicit an incriminating response from defendant when the officer had prior knowledge that defendant had committed murder, engaged defendant in a conversation, and "steered the conversation to a topic which, if discussed by Defendant, was likely to elicit an incriminating statement."). The State argues that Detective Enoch's question "if [defendant] wanted [him] to come back the next day" was only to find out if Detective Enoch needed to come into work the next day or not. However, the only reason Detective Enoch was trying to determine if he should come into work the next day, thereby incurring overtime expenses, was to see if it would be worthwhile for him to come to work, and for Detective Enoch, it would have been worthwhile only if defendant would be willing to give a statement regarding the charges against him. Such comments would reasonably call for an answer from defendant stating that defendant would not cooperate, defendant would cooperate or defendant could show his cooperation by immediately giving a statement, as he did here. Detective Enoch received defendant's cooperation, as requested.

The trial court's findings also support that Detective Enoch had "knowledge . . . concerning the unusual susceptibility of a defendant to a particular form of persuasion . . . ." *Fisher*, 158 N.C. App. at 143, 580 S.E.2d at 413. Detective Enoch knew that defendant was peculiarly susceptible to an appeal to defendant's relationship with Detective Enoch from his previous interviews and dealings with

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defendant. Detective Enoch knew defendant, had interviewed defendant at least two times before in a previous case, and as a result had established a rapport with defendant, enough so that defendant asked Detective Enoch to tell his parents in the hospital that he would be charged in this case. Detective Enoch acknowledged that he was attempting to build on his rapport with defendant during his conversations with defendant. Detective Enoch was aware that defendant valued his opinion of defendant, and defendant even stated before making the incriminating statements that “he just didn’t want [Detective Enoch] to think he was a bad person[.]” However, more importantly, Detective Enoch knew that defendant was still under the effects of the attempted overdose on prescription medication and alcohol and would therefore be peculiarly susceptible to persuasion. On 3 September 2005, defendant still seemed “a little weak” and “a little medicated” to Detective Enoch, enough so that Detective Enoch had to help defendant into his patrol car. *See Innis*, 446 U.S. at 302-03, 64 L. Ed. 2d at 309 (1980) (While evaluating whether the officers were aware if defendant was peculiarly susceptible to a form of persuasion, the Court noted whether the police knew that defendant “was unusually disoriented or upset at the time of his arrest.”)

As to the intent of the police, *Washington*, 102 N.C. App. at 539, 402 S.E.2d at 854, Detective Enoch stated that it was not his intent to get a confession from defendant on 3 September 2005. However, Detective Enoch testified that he wanted a response from defendant regarding his cooperation with the investigation. Also, as the focus of the definition of interrogation is on the suspect’s perceptions, *Innis*, 446 U.S. at 301, 64 L. Ed. 2d at 308, defendant testified that during the car ride to the Sheriff’s Department he knew Detective Enoch was “talking to me and trying to get me to, you know—I could tell he was trying to get me to talk . . . .”

Under these circumstances, the trial court properly concluded that defendant was subjected to interrogation by Detective Enoch and this interrogation elicited defendant’s incriminating statements.

The State cites *State v. Vick*, 341 N.C. 569, 461 S.E.2d 655 (1995), *State v. Forney*, 310 N.C. 126, 310 S.E.2d 20 (1984) and *State v. McQueen*, 324 N.C. 118, 377 S.E.2d 38 (1989) in support of its argument that Detective Enoch’s statements to defendant were not statements that Detective Enoch should have known were reasonably likely to elicit an incriminating response from defendant and therefore were not custodial interrogation. As these cases are distinguish-

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able from the facts in this case, we are not persuaded by the State's contentions.

In *State v. Vick*, the defendant was arrested but had not been advised of his *Miranda* rights. 341 N.C. 569, 578, 461 S.E.2d 655, 660 (1995). While defendant was being processed at the Sheriff's Department, a deputy told the defendant he would like to talk to the defendant after the fingerprinting was complete and would answer at that time any questions defendant had concerning his arrest. *Id.* at 578, 461 S.E.2d at 660. In response, the defendant made incriminating statements, and the deputy then repeated his statement that he would answer defendant's questions when processing was completed and left the room. *Id.* Our Supreme Court ruled that the deputy's statements "were not intended nor reasonably expected to elicit an incriminating response from defendant," and did not constitute interrogation. *Id.* at 581, 461 S.E.2d at 662.

In *State v. Forney*, the sheriff was taking defendant from the jail to the courthouse for his preliminary hearing. 310 N.C. 126, 130, 310 S.E.2d 20, 22 (1984). As the sheriff was escorting defendant through the jail, they passed a cell containing two inmates and the sheriff asked defendant, "Do you know these two fellows?" *Id.* In response, defendant made incriminating statements. *Id.* "No other conversation took place as they passed and they 'walked right on out.'" *Id.* at 131, 310 S.E.2d at 23. The trial court held that the sheriff's question did not constitute "interrogation" and defendant's response was admissible. *Id.* at 131, 310 S.E.2d at 23.

Here, the record shows that unlike the officers in *Vick* or *Forney*, Detective Enoch had a series of conversations before defendant was read his *Miranda* rights and while he was in custody. Additionally, unlike *Vick* or *Forney*, after telling defendant they were not talking about the case, Detective Enoch continued talking about defendant's cooperation with the investigation and ended with a question that could reasonably be expected to elicit an incriminating response from defendant. Therefore, *Vick* and *Forney* are not applicable.

In *State v. McQueen*, 324 N.C. 118, 127, 377 S.E.2d 38, 44 (1989), the officer asked defendant as he was escorting defendant out of a river gorge, "I guess you're tired and hungry[,] and "if he had come all the way down the river[?]" Defendant answered the officer's questions, but then asked a question to the officer and made incriminating statements. *Id.* However, defendant had been advised of his *Miranda* rights prior to the officer's statements to defendant and defendant

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argued that he invoked his Fifth Amendment right to counsel immediately after being read his *Miranda* rights and the officer's questions amounted to interrogation in contravention to his *Miranda* rights. *Id.* at 128, 377 S.E.2d at 44. The trial court held that the statements by defendant were not the result of interrogation because the officer's questions were "in the nature of general conversation[.]" taking place during rest periods during the climb out of the river gorge, and not of a kind which the officer should have known were reasonably likely to elicit incriminating responses. *Id.* at 129, 377 S.E.2d at 45. Like the officer in *McQueen*, Detective Enoch carried on "casual conversation" with defendant. Unlike *McQueen*, Detective Enoch's conversation with defendant did not remain in the "nature of general conversation" as he moved the conversation to defendant's cooperation with the investigation and to comments which were reasonably likely to elicit an incriminating response. Therefore, *McQueen* is not applicable here.

As defendant here was in custody and subjected to interrogation without advisement of his *Miranda* rights at the time defendant made statements to Detective Enoch, the trial court properly suppressed defendant's statements to Detective Enoch.

## III. Conclusion

Accordingly, we hold that there was competent evidence supporting the trial court's findings of fact and the trial court's findings of fact support the trial court's conclusions of law. Therefore, we affirm the trial court's order suppressing statements made by defendant on 3 September 2005 to Detective Michael Enoch of the Alamance County Sheriff's Department.

AFFIRMED.

Judges WYNN and BEASLEY concur.

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STATE OF NORTH CAROLINA v. MICHAEL BURNETTE SINGLETON, DEFENDANT

No. COA09-263

(Filed 5 January 2010)

**1. Appeal and Error— jurisdiction—satellite-based monitoring determinations**

The Court of Appeals has jurisdiction to consider an appeal from satellite-based monitoring (SBM) determinations under N.C.G.S. § 14-208.40B pursuant to N.C.G.S. § 7A-27 because an SBM order is a final judgment from the superior court.

**2. Sexual Offenders— satellite-based monitoring—aggravated offense required**

The trial court erred by ordering defendant to enroll in satellite-based monitoring (SBM) under N.C.G.S. § 14-208.40B for the remainder of his natural life after he pled guilty to a charge of taking indecent liberties with a child under N.C.G.S. § 14-202.1 because the offense of indecent liberties with a child does not fit within the definition of an “aggravated offense” under N.C.G.S. § 14-208.6(1a).

Appeal by defendant from judicial findings and order entered on or about 29 August 2008 by Judge Henry E. Frye, Jr. in Superior Court, Guilford County. Heard in the Court of Appeals 2 September 2009.

*Attorney General Roy A. Cooper, III, by Special Counsel Hilary S. Peterson, for the State.*

*Robert W. Ewing, for defendant-appellant.*

STROUD, Judge.

Defendant appeals from an order requiring him to enroll in satellite-based monitoring (SBM) pursuant to N.C. Gen. Stat. § 14-208.40B for the remainder of his natural life. Because the plain language of N.C. Gen. Stat. § 14-208.40(a)(1), N.C. Gen. Stat. § 14-208B(c) and N.C. Gen. Stat. § 14-208.6(1a) requires enrollment in lifetime satellite-based monitoring for an offender who is *convicted* of an “aggravated offense,” we reverse.

**I. Factual background**

On 5 May 2006, a warrant for defendant’s arrest was issued, charging him with taking indecent liberties with a child pursuant to

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N.C. Gen. Stat. § 14-202.1(a)(1) (2005). At the time of the offense, defendant was age sixteen and the victim was age four. On 19 June 2006, a superceding indictment was issued, also charging defendant with taking indecent liberties with a child. On 21 August 2006, defendant pled guilty to a charge of taking indecent liberties with a child pursuant to N.C. Gen. Stat. § 14-202.1. Defendant had no prior record and was sentenced within the presumptive range based on prior record level I to imprisonment for not less than sixteen months and not more than twenty months, but this sentence was suspended and defendant was placed on probation for thirty-six months. Defendant was placed on intensive supervision for six months and was required to remain in high school, to complete the sex offender control program, and to register as a sex offender.

On 2 June 2008, the State filed a Petition for Judicial Findings as to Satellite-Based Monitoring, pursuant to N.C. Gen. Stat. § 14-208.40B (2007) for the trial court to order defendant to enroll in SBM. The State alleged that (1) the defendant is classified as a sexually violent predator pursuant to N.C. Gen. Stat. § 14-208.40B or; (2) the defendant is a recidivist or; (3) the offense of which defendant was convicted was an aggravated offense. The petition identified defendant's prior reportable conviction<sup>1</sup> for taking indecent liberties with a child as the basis for the request for SBM.

The trial court held the SBM determination hearing on 29 August 2008. The State presented testimony by Probation Officer Brian Holbrook, who was defendant's assigned probation officer. Officer Holbrook testified that defendant had not been assessed as a sexually violent predator, and that he had no prior convictions, so he was not a recidivist, but that defendant's conviction was for an "aggravated offense." Officer Holbrook testified that the victim was a 4 year old boy who was a friend of the family. On 20 April 2006, defendant and the victim were playing outside and then they went inside and, "long story short, there was anal penetration on a four year old boy." The court inquired "I guess as a result of the plea, it was reduced to inde-

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1. N.C. Gen. Stat. § 14-208.6(4) (2007) defines four different categories of crimes which are considered as "reportable conviction[s]" for purposes of Sex Offender Registration and SBM. Defendant herein had a "final conviction" for a "sexually violent offense," which is defined by N.C. Gen. Stat. § 14-208.6(5). The definition of "sexually violent offense[s]" includes reference to nineteen separate crimes, identified by specific statutory references, as well as solicitation or conspiracy to commit any of the offenses or aiding and abetting any of these offenses. Taking indecent liberties with children in violation of N.C. Gen. Stat. § 14-202.1 is identified as a "sexually violent offense." N.C. Gen. Stat. § 14-208.6(5).

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cent liberties?” Officer Holbrook answered, “Yes, Your Honor.” Although the record does not contain defendant’s STATIC 99 Risk Assessment, Officer Holbrook testified that the probation department had made a determination that defendant “is risked at a high.”<sup>2</sup> Officer Holbrook noted that he could inform the court “about his supervision if you’d like[,]” but the court inquired only as to whether defendant was registered, and Officer Holbrook said that defendant was registered as a sex offender. Defendant did not present any evidence. On 29 August 2008, the trial court entered an order finding that “The defendant (a) falls into one of the categories requiring satellite-based monitoring under G.S. 14-208.40 in that the offense of which the defendant was convicted was an aggravated offense.” The trial court therefore ordered that defendant shall enroll in SBM for “the remainder of his natural life.”

## II. Grounds for Appellate Review

**[1]** Defendant first argues that the court has jurisdiction over this appeal pursuant to N.C. Gen. Stat. § 7A-27(b)<sup>3</sup> and N.C. Gen. Stat. § 15A-1442<sup>4</sup>. In the alternative, defendant filed a petition for certiorari

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2. We note that the evidence regarding the DOC’s risk assessment, which found the defendant to be a “high” risk, was actually unnecessary and irrelevant at this particular hearing. In the “first category” of offenders under N.C. Gen. Stat. § 14-208B(c) (2007), SBM is required if the trial court determines that the offender is “qualified.” No DOC risk assessment is required. The State was not seeking SBM of defendant pursuant to the “second category” of offenders pursuant to N.C. Gen. Stat. § 14-208.40B(c). *See State v. Kilby*, — N.C. App. —, —, 679 S.E.2d 430, 433 (2009) (This “second category” includes “(2) Any offender who satisfies all of the following criteria: (i) is convicted of a reportable conviction as defined by N.C. Gen. Stat. § 14-208.6(4), (ii) is required to register under Part 2 of Article 27A of Chapter 14 of the General Statutes, (iii) has committed an offense involving the physical, mental, or sexual abuse of a minor, and (iv) based on the Department’s risk assessment program requires the highest possible level of supervision and monitoring. N.C. Gen. Stat. § 14-208.40(a)(1)-(2) (2007).”) A DOC risk assessment is necessary only for offenders alleged to fall in the “second category.”

3. N.C. Gen. Stat. § 7A-27 (2007) governs the appellate jurisdiction of the Court of Appeals and of the Supreme Court for appeals from the trial divisions. Subsection (b) provides that “[f]rom any final judgment of a superior court . . . appeal lies of right to the Court of Appeals.” *Id.*

4. N.C. Gen. Stat. § 15A-1442 (2007) governs the grounds for correction of error by the appellate division in criminal cases, and provides that “The following constitute grounds for correction of errors by the appellate division.

....

(6) Other Errors of Law.—Any other error of law was committed by the trial court to the prejudice of the defendant.”

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requesting review pursuant to N.C. Gen. Stat. § 15A-1444(a1) (2007). The State does not contest that this Court has jurisdiction over this appeal, although the State argues that certiorari is not appropriate. However, defendant's argument as to the grounds for appellate review is well-taken, as the grounds for appeal are not entirely obvious. Although this Court has considered several appeals of orders for SBM under N.C. Gen. Stat. § 14-208.40B and N.C. Gen. Stat. § 14-208.40A, we have not addressed the basis for this Court's jurisdiction. Unfortunately, Chapter 14, Article 27A leaves many procedural questions as to SBM, including the manner of appeal, unanswered.

Generally, appeals based upon "errors committed in criminal trials and proceedings" are governed by Article 91 of Chapter 15A, the Criminal Procedure Act. N.C. Gen. Stat. § 15A-1401 (2007). Appellate jurisdiction in criminal appeals by a defendant and grounds for appeal in criminal cases are set forth in N.C. Gen. Stat. § 15A-1442 and N.C. Gen. Stat. § 15A-1444. "[A] defendant's right to appeal in a criminal proceeding is purely a creation of state statute. Furthermore, there is no federal constitutional right obligating courts to hear appeals in criminal proceedings." *State v. Pimental*, 153 N.C. App. 69, 72, 568 S.E.2d 867, 869, *disc. review denied*, 356 N.C. 442, 573 S.E.2d 163 (2002).

Generally, the right to appeal in criminal cases is set out in N.C. Gen. Stat. § 15A-1444 (2003). Under that statute, a defendant who pleads not guilty at trial may appeal the judgment itself as a matter of right. N.C. Gen. Stat. § 15A-1444(a). In addition, a defendant who was found guilty or who pled guilty or no contest has the right to appeal the following issues:

(1) whether the sentence is supported by the evidence (if the minimum term of imprisonment does not fall within the presumptive range); (2) whether the sentence results from an incorrect finding of the defendant's prior record level under N.C. Gen. Stat. § 15A-1340.14 or the defendant's prior conviction level under N.C. Gen. Stat. § 15A-1340.21; (3) whether the sentence constitutes a type of sentence not authorized by N.C. Gen. Stat. § 15A-1340.17 or § 15A-1340.23 for the defendant's class of offense and prior record or conviction level; (4) whether the trial court improperly denied the defendant's motion to suppress; and (5) whether the trial court improperly denied the defendant's motion to withdraw his guilty plea.

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*State v. Brown*, 170 N.C. App. 601, 606, 613 S.E.2d 284, 287 (quoting *State v. Carter*, 167 N.C. App. 582, 584, 605 S.E.2d 676, 678 (2004)), *disc. review denied*, 360 N.C. 68, 621 S.E.2d 882 (2005).

In *Brown*, this Court held that a defendant has no statutory right of appeal from an order denying post-conviction DNA testing pursuant to N.C. Gen. Stat. § 15A-269. *Id.* at 606-07, 613 S.E.2d at 287. We rejected defendant's contention that he had a right to appeal under N.C. Gen. Stat. § 7A-27(b) because a post-conviction DNA motion is a "criminal proceeding," but an order denying DNA testing is not a "final judgment" in a "criminal proceeding." *Id.* at 606, 613 S.E.2d at 287. We went on to hold that

[u]nder N.C. Gen. Stat. § 15A-101(4a) (2003), judgment is defined as 'when sentence is pronounced.' *See also Berman v. United States*, 302 U.S. 211, 212, 82 L. Ed. 204, 204, 58 S. Ct. 164, 165 (1937) ('Final judgment in a criminal case means sentence. The sentence is the judgment.'). The [order denying post-conviction DNA testing] does not involve the pronouncement of a sentence.

*Id.* at 606-07, 613 S.E.2d at 287.

In all of the SBM cases considered thus far by this Court, the SBM hearings have been conducted as "criminal" hearings, at least in the sense that the hearings were placed on criminal, not civil, calendars; the district attorney has represented the State; and the defendants have been represented by court-appointed counsel. However, SBM hearings are not "criminal" proceedings in the sense as addressed by Article 15A, Chapter 91. N.C. Gen. Stat. § 1-5 (2007) defines a "criminal action" as "(1) An action prosecuted by the State as a party, against a person charged with a public offense, for the punishment thereof. (2) An action prosecuted by the State, at the instance of an individual, to prevent an apprehended crime against his person or property." N.C. Gen. Stat. § 1-6 (2007) provides that "[e]very other is a civil action." A SBM proceeding is prosecuted by the State, but the defendant has not been charged with a "public offense" for which the State is seeking punishment. *State v. Bare*, — N.C. App. —, —, 677 S.E.2d 518, 526-27 (2009) (holding that even though the SBM hearings are prosecuted by the State, they are not designed as criminal punishment). According to N.C. Gen. Stat. §§ 1-5 and 1-6, an SBM proceeding, particularly one conducted under N.C. Gen. Stat. § 14-208.40B, would not be a "criminal action," so it must be a "civil action." In a SBM hearing, there is no entry of a plea of "guilty," "not guilty" or "no contest." *See* N.C. Gen.

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Stat. § 15A-1444. There is no jury verdict and certainly no “sentence” is pronounced in a SBM determination hearing under N.C. Gen. Stat. § 14-208.40B.<sup>5</sup> The SBM determination is distinguished from post-conviction DNA testing by the fact that a motion for DNA testing seeks to attack the underlying final criminal judgment. If a post-conviction DNA testing reveals evidence which is favorable to the defendant, “the court shall enter an order that ‘serves the interests of justice’ and may (1) vacate and set aside the judgment, (2) discharge the defendant, (3) resentence the defendant, or (4) grant a new trial.” *Brown*, 170 N.C. App. at 605, 613 S.E.2d at 286-87 (quoting N.C. Gen. Stat. § 15A-270(c)). By contrast, the SBM determination hearing has no effect whatsoever upon the defendant’s prior criminal convictions or sentencing and is not a part of any “criminal proceedings” or “criminal prosecution” of the defendant.

In addition to these distinctions between SBM proceedings and criminal prosecutions, the most important distinction is that this Court has held that the SBM statutes establish a civil regulatory regime and not a means of punishment for a crime. *See State v. Bare*, — N.C. App. —, —, 677 S.E.2d 518, 527 (2009); *State v. Anderson*, — N.C. App. —, —, 679 S.E.2d 165, 167 (2009). Therefore, for purposes of appeal, a SBM hearing is not a “criminal trial or proceeding” for which a right of appeal is based upon N.C. Gen. Stat. § 15A-1442 or N.C. Gen. Stat. § 1444.

SBM hearings have been conducted much like probation violation hearings, which may be appropriate as probation violation hearings are not criminal prosecutions either. *See State v. Pratt*, 21 N.C. App. 538, 540, 204 S.E.2d 906, 907 (1974) (“A proceeding to revoke probation is not a criminal prosecution but is a proceeding solely for the determination by the court whether there has been a violation of a valid condition of probation so as to warrant putting into effect a sentence theretofore entered[.]”) However, SBM hearings are unlike probation violation hearings in that a defendant who appeals from a revocation of probation has a specific right to appeal under N.C. Gen. Stat. § 15A-1347 (2007). The SBM statutes do not contain any specific right of appeal from the superior court’s determination as to SBM.

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5. Under N.C. Gen. Stat. § 14-208.40A(a), the SBM determination is made “during the sentencing phase,” where the defendant has been convicted of a “reportable conviction.” However, the SBM determination is separate from the sentencing hearing. *See State v. Causby*, — N.C. App. —, —, 683 S.E.2d 262, 263 (2009) (After defendant’s sentencing hearing, the trial court conducted a separate hearing to determine whether defendant should be enrolled in a SBM program.)

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This Court has previously noted that, “[f]or all practical purposes there is an unlimited right of appeal in North Carolina to the Appellate Division of the General Court of Justice from any final judgment of the superior court or the district court in civil and criminal cases.” *State v. Black*, 7 N.C. App. 324, 327, 172 S.E.2d 217, 219 (1970) (citing N.C. Gen. Stat. § 7A-27). Under N.C. Gen. Stat. § 7A-27, the primary consideration is that the appeal must be from a “final judgment,” and that appeals from interlocutory orders are allowed only in certain limited situations. Certainly the 29 August 2008 order requiring defendant to submit to SBM for the remainder of his natural life is a “final judgment.” Our Supreme Court has defined a final judgment as “one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court.” *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950) (citation omitted). The 29 August 2008 order disposes of the State’s petition for judicial findings as to satellite-based monitoring of defendant and leaves nothing further to be judicially determined. As the SBM order is a final judgment from the superior court, we hold that this Court has jurisdiction to consider appeals from SBM monitoring determinations under N.C. Gen. Stat. § 14-208.40B pursuant to N.C. Gen. Stat. § 7A-27.

**III. Standard of Review**

This Court stated the standard of review for orders as to SBM in *State v. Kilby*: “[w]e review the trial court’s findings of fact to determine whether they are supported by competent record evidence, and we review the trial court’s conclusions of law for legal accuracy and to ensure that those conclusions reflect a correct application of law to the facts found.” — N.C. App. —, —, 679 S.E.2d 430, 432 (2009) (quoting *State v. Garcia*, 358 N.C. 382, 391, 597 S.E.2d 724, 733 (2004) (citation, quotation marks, and brackets omitted), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005)).

**IV. Aggravated Offense**

[2] Defendant argues that the trial court’s finding that he was convicted of an “aggravated offense” and that he therefore was required to enroll in SBM for the rest of his natural life was in error as the finding is not supported by competent evidence. The State sought an order for SBM based upon N.C. Gen. Stat. § 14-208.40 (a)(1), which provides for SBM for “[a]ny offender who is convicted of a reportable conviction as defined by G.S. 14-208.6(4) and who is required to register under Part 3 of Article 27A of Chapter 14 of the General Statutes

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because the defendant is classified as a sexually violent predator, is a recidivist, or *was convicted of an aggravated offense* as those terms are defined in G.S. 14-208.6.” N.C. Gen. Stat. § 14-208.40(a)(1) (2007) (emphasis added). N.C. Gen. Stat. § 14-208.40B(c) provides that if the court determines that “the *conviction offense* was an *aggravated offense*, the court shall order the offender to enroll in satellite-based monitoring for life.” (emphasis added).

N.C. Gen. Stat. § 14-208.6(1a) (2007) defines “aggravated offense” as “any criminal offense that includes either of the following: (i) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim of any age through the use of force or the threat of serious violence; or (ii) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim who is less than 12 years old.” N.C. Gen. Stat. § 14-208.6(1a).

Defendant was convicted of taking indecent liberties with a child in violation of N.C. Gen. Stat. § 14-202.1, which provides that

(a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:

(1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or

(2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.

N.C. Gen. Stat. § 14-202.1 (2005).

The State concedes that indecent liberties with a child is not an “aggravated offense” as defined by N.C. Gen. Stat. § 14-208.6(1a), as the “bare elements” of the offense do not require either “engaging in a sexual act involving vaginal, anal, or oral penetration of a minor under the age of twelve.” However, the State argues that

[t]he crucial question in this appeal is not whether, by definition, the crime of which Defendant was convicted—taking indecent liberties with a child—is an ‘aggravated offense’ under N.C.G.S. § 14-208.6(1a). Instead, the issue is whether Defendant’s guilty plea, in conjunction with the proffered factual basis for the conviction at the determination hearing, supported the trial court’s

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conclusion that Defendant *committed* an ‘aggravated offense’ thus subjecting him to lifetime enrollment in the SBM program.

(emphasis added). According to the State “the testimony of Defendant’s probation officer and through no objections from the Defendant, established the necessary criteria to meet the ‘aggravated offense’ standard, the trial court’s lifetime enrollment of Defendant in the SBM program was proper.” Therefore, the State asks us to base the determination of whether the defendant’s “criminal offense” was an “aggravated offense” upon the facts of the underlying reportable offense as presented at the SBM hearing instead of upon the statutory elements of the crime for which the defendant was convicted.

The State’s argument has recently been rejected by this Court in *State v. Davison*, — N.C. App. —, —, S.E.2d —, — (December 8, 2009) (No. COA09-212) (stating that “[t]he General Assembly’s repeated use of the term ‘conviction’ compels us to conclude that, when making a determination pursuant to N.C.G.S. § 14-208.40A, the trial court is only to consider the elements of the offense of which a defendant was convicted and is not to consider the underlying factual scenario giving rise to the conviction.”). Accordingly, N.C. Gen. Stat. § 14-208.40(a)(1) requires that the offender be “*convicted* of an aggravated offense[,]” and N.C. Gen. Stat. § 14-208.40B(c) refers to the trial court’s determination that “the *conviction offense* was an aggravated offense.” (emphasis added). N.C. Gen. Stat. § 208.6(4) defines “reportable conviction” based upon a particular “final conviction.”

The State notes the General Assembly’s intent of protecting the public from sex offenders as expressed in Article 27A and argues that based upon the General Assembly’s protective intent, we should read the definition of an “aggravated offense” broadly, such that we look beyond the statutory elements of a crime and consider both the elements of the crime and “the specific facts upon which the conviction is based.” However, the plain language of the statute dictates a contrary result. We have previously held that

[t]he primary goal of statutory construction is to effectuate the purpose of the legislature in enacting the statute. The first step in determining a statute’s purpose is to examine the statute’s plain language. Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning.

*Cashwell v. Department of State Treasurer, Retirement Systems Division*, — N.C. App. —, —, 675 S.E.2d 73, 76 (2009). At least in

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regard to this particular issue, the statutes are clear and unambiguous. All of the relevant SBM statutes refer to the offense of which the offender was *convicted*, not charged, or even, as in this case, perhaps could have been charged. *See* N.C. Gen. Stat. §§ 14-208.6(4); 14-208.40; 14-208.40B.

This case demonstrates some of the problems which arise if the determination as to SBM could be based upon the “factual basis” of a prior conviction as opposed to the actual conviction. The State argues that “[i]n its proffer to the trial court at the determination hearing, the State related the factual basis for Defendant’s guilty plea was that Defendant had anally penetrated a four year old boy.” It is true that defendant’s probation officer testified that the defendant’s anal penetration of a four year old boy was the factual basis for his prior conviction, but the record does not contain any information whatsoever about the “factual basis” for the defendant’s plea which was actually provided to the court on 21 August 2006, when defendant entered his plea.<sup>6</sup> In addition, the trial court, upon hearing the testimony concerning the anal penetration of a four year old child, understandably assumed that defendant must have originally been charged with a greater offense, such as a first degree sexual offense under N.C. Gen. Stat. § 14-27.4 (2005) or a second degree sexual offense under N.C. Gen. Stat. § 14-27.5 (2005), but defendant had agreed to enter a plea to a lesser offense, taking indecent liberties with a child. Officer Holbrook incorrectly informed the trial court that defendant had pled to a reduced charge. The State introduced the file for the underlying offense at the SBM hearing, which demonstrates that defendant was charged *only* with taking indecent liberties with a child. He pled guilty to the same charge, with no reduction in the charge against him. He was never convicted of, or even charged with, any crime other than taking indecent liberties with a child.

The SBM statutes require a “reportable *conviction*,” which is itself defined as a “final *conviction*” of one of many particular enumerated offenses, in order for the State to petition for an offender’s enrollment in SBM. N.C. Gen. Stat. § 14-208.40B; N.C. Gen. Stat. § 14-208.6(4). The SBM statutes break down the various “report-

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6. N.C. Gen. Stat. § 15A-1022(c) (2007) states the requirements for a “factual basis” for acceptance of a plea of guilty or no contest. Although we express no opinion on the issue, there is certainly a question as to whether Officer Holbrook’s brief hearsay description of defendant’s offense would suffice as a “factual basis” under N.C. Gen. Stat. § 15A-1022(c)(4). Article 27A, Sex Offender and Public Protection Registration Programs, contains no reference to a “factual basis” for any reportable conviction.

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able convictions” into two categories for purposes of SBM. N.C. Gen. Stat. § 14-208.6(4)(a). Those two categories include “A final conviction for [1] an offense against a minor [or] [2] a sexually violent offense<sup>7</sup>[.]” *Id.*

As to the particular offenses identified under N.C. Gen. Stat. § 14-208.40(a)(1), lifetime SBM is required, without the need for the court to consider any other factors. N.C. Gen. Stat. § 14-208.40B(c). As to N.C. Gen. Stat. § 14-208.40(a)(2), if a defendant is convicted of a “reportable conviction,” then the trial court must consider the level of risk of the offender’s recidivism, if the offender requires the “highest possible level of supervision and monitoring” and the time period of SBM which should be imposed. N.C. Gen. Stat. § 14-208.40B(c). If SBM monitoring determinations could be based only upon the “factual basis” for a reportable offense which would demonstrate that the defendant actually committed a more serious crime than his “conviction crime,” there would have been no need for the legislature to set forth in such detail the particular crimes which are subject to a particular degree of monitoring. In addition, the offender may be placed in the untenable position of having to refute factual allegations about a crime he may have committed years earlier in order to try to convince the court that the crime for which he was “convicted” was actually as stated by his conviction, and not a more serious crime. Evidence and witnesses as to the facts of the “reportable conviction” may no longer be available.

Therefore, the trial court’s finding that defendant was *convicted* of indecent liberties with a child was supported by competent record evidence, as this was his “conviction offense.” The trial court’s conclusion that defendant had been convicted of an “aggravated offense” was legally incorrect, as the offense of indecent liberties with a child does not fit within the definition of an “aggravated offense” pursuant to N.C. Gen. Stat. § 14-208.6(1a). In addition, the trial court’s conclusion of law that defendant must be enrolled in SBM for the remainder of his natural life was also in error, as this conclusion did not “reflect a correct application of law to the facts found.” *State v. Kilby*, — N.C. App. at —, 679 S.E.2d at 432. The order requiring defendant to enroll in SBM for the remainder of his natural life is therefore reversed.

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7. The definition of “offense against a minor” includes reference to three separate crimes, identified by specific statutory references. N.C. Gen. Stat. § 14-208.6(1i). The definition of “sexually violent offense[s]” includes reference to nineteen separate crimes, identified by specific statutory references. N.C. Gen. Stat. § 14-208.6(5).

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Because we have granted the relief as defendant requested, we need not address defendant's other assignments of error.

REVERSED.

Judges GEER and ERVIN concur.

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STATE OF NORTH CAROLINA v. ANTWAN MAURICE SANDERS

No. COA09-443

(Filed 5 January 2010)

**1. Criminal Law— jury instructions—duress—insufficient evidence**

The trial court did not err in a prosecution for, *inter alia*, first-degree kidnapping and robbery with a dangerous weapon by refusing to instruct the jury on the defense of duress. Defendant's testimony did not show that his actions were caused by a reasonable fear that he would suffer immediate death or serious bodily injury if he did not so act.

**2. Criminal Law— motion for mistrial denied—evidence of polygraph examination nonprejudicial**

The trial court in a prosecution for first-degree kidnapping, robbery with a dangerous weapon, first-degree sexual offense, and murder did not abuse its discretion by denying defendant's motion for a mistrial. Although the Court of Appeals disapproved of the State submitting to the jury exhibits containing references to a polygraph examination administered to a witness, admission of the exhibits was not prejudicial error as the exhibits did not contain evidence of the results of the polygraph examination.

**3. Criminal Law— prosecutor's closing argument—intervention not required**

The trial court in a prosecution for first-degree kidnapping, robbery with a dangerous weapon, first-degree sexual offense, and murder did not err by failing to intervene *ex mero motu* during the prosecutor's closing arguments because the prosecutor's comments were not so grossly improper as to require the trial court's intervention.

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**4. Criminal Law— prosecutor’s closing argument—trial court’s instruction—prejudice cured**

The trial court in a first-degree kidnapping, robbery with a dangerous weapon, first-degree sexual offense, and murder prosecution did not abuse its discretion by overruling defendant’s objection to the prosecutor’s characterization of the law made during closing arguments. The trial court’s subsequent instruction cured any prejudice from the prosecutor’s comments.

Appeal by defendant from judgments entered 19 August 2008 by Judge David S. Cayer in Mecklenburg County Superior Court. Heard in the Court of Appeals 13 October 2009.

*Attorney General Roy Cooper, by Special Deputy Attorney General Diane A. Reeves, for the State.*

*Appellate Defender Staples Hughes, by Assistant Appellate Defender Andrew DeSimone, for defendant-appellant.*

BRYANT, Judge.

Defendant Antwan Sanders appeals from judgments and commitments entered after a jury found him guilty of two counts of first-degree murder, two counts of first-degree kidnapping, and first-degree sexual offense. For the reasons stated herein, we find no prejudicial error.

*Facts*

In June 1993, defendant was eighteen years old and resided in Mount Holly, North Carolina. During the evening of 2 June, defendant met twenty-two year old Myron Burris and nineteen year old Robert Friday. Defendant and Burris often met after school to “smoke weed and drink and whatnot . . . .” Defendant and Friday were mere acquaintances.

Burris knew of a drug dealer in Charlotte they could rob of his drugs. The dealer was a “[l]aid back dude, didn’t carry no gun. . . . It [would be] like taking candy from a baby, all [they] had to do was get up in the house.” Defendant knew only that the dealer resided on the south side of Charlotte, approximately thirty minutes from Mount Holly. The three agreed to the robbery. All three entered Friday’s grey Nissan Sentra.

While riding, they stopped at a convenience store for beer, cigarettes, and rolling papers. For forty minutes, Burris and Friday

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smoked marijuana, and in the back seat, defendant smoked marijuana laced with crack cocaine. Defendant later testified that Friday carried a .32 caliber revolver, Burris a .38 caliber revolver, and defendant, himself, carried a .45 caliber revolver. They arrived at Emerald Bay Apartments in Charlotte; it was between 8:00 and 8:30 p.m. Burris pointed out the dealer's apartment but did not exit the vehicle. Friday and defendant went to the dealer's door. Defendant knocked, and Friday stood to one side ready to charge the door if it was opened; however, no one answered. Friday and defendant returned to the vehicle, and the three rode away, intending to return within minutes. Upon their return, Friday and defendant again went to the apartment door but, again, received no answer. Back at the vehicle, as they prepared to leave, the three spotted two teenage girls standing at the opposite end of the apartment complex.

According to defendant, he was sitting in the backseat, Burris was in the front passenger seat, and Friday was the driver. As they pulled up next to the girls, Burris asked if the girls knew the drug dealer they were trying to find. While he engaged in small talk, Burris got out of the car, then took out his gun and pointed it at the girls.

A neighbor heard a young woman's voice and looked out of her apartment window to see what was happening. According to the neighbor, two girls, seventeen year old T.L. and fifteen year old R.C., were standing beside a grey or silver 1980's model Nissan Sentra, and a black man was standing in front of them with a silver handgun. The neighbor overheard the man tell the girls to get into the car. He pulled the front passenger seat back, the girls got into the back seat, the man got into the front passenger seat, closed the door, and the car drove off.

Defendant testified he was seated behind the driver, the two girls were seated beside him, and Burris was the front passenger. According to defendant, Burris turned around, "had a gun on [the girls,]" and instructed defendant to "go ahead and get that from them." Defendant took jewelry from R.C., and T.L. handed her necklace to Burris.

Friday drove toward Mount Holly then turned off onto Exchange Street and ultimately onto an unlit gravel road which ran beside a warehouse before coming to a dead end. Burris testified that the girls "were crying, asking — begging for their life, [sic] hysterical . . . ."

Defendant testified that Burris exited the vehicle, grabbed the girl nearest the door, pulled her from the backseat, then walked with her

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out of sight, toward a wooded area. Friday exited the driver's seat, pointed his gun toward the back seat, and ordered the second girl out. Defendant testified that she grabbed a hold of him and said, "Don't let nothing happen to me." Defendant responded, "Ain't nothing going to happen to you," before defendant "grabbed her and pulled her out of the car."

Defendant testified that Friday ordered the girl to undress and perform oral sex on defendant while Friday forcibly engaged her in intercourse. Defendant testified that if he had not cooperated Friday "[p]robably [sic] shot me out there." "[M]y life was in danger. I knew he would have shot me. . . . [H]e got a gun on me and I know he [sic] trigger happy[.]"

After the sex acts, Friday grabbed the girl and took her toward the woods. Defendant returned to the backseat of the vehicle. Sitting there, defendant heard four shots. When Friday and Burris returned, defendant testified that Friday tapped defendant on his forehead with a gun, and said, "Only us three know about it. . . . If you get out and you say something . . . I'm going to burn you next, we're going to burn you next." Friday, Burris, and defendant then drove away. On the way to Mount Holly, Friday stopped at a convenience store while defendant went in and bought alcoholic beverages for each of them. The three returned to Mount Holly and spent the night at the home of Friday's girlfriend. The next morning, Friday dropped defendant off near his home. At the time of trial, in July 2008, defendant testified that he had seen Friday only two times in the fifteen years since the night of 2 June 1993.

On 8 June 1993, Detective Milton Harris, then a field training officer with the Charlotte Police Department, responded to a 9-1-1 call reporting two bodies in a field off of 1420 Exchange Street. When Det. Harris arrived at the scene, he discovered the unclothed, partially decomposed bodies of T.L. and R.C.

On 5 April 2005, defendant was indicted on two counts of first-degree kidnapping, two counts of robbery with a dangerous weapon, two counts of first-degree sexual offense, and two counts of murder. A trial before a jury in Mecklenburg County commenced on 21 July 2008 at the conclusion of which, the jury found defendant guilty of two counts of first-degree kidnapping, two counts of robbery with a dangerous weapon, one count of first-degree sexual offense, and two counts of first-degree felony murder premised on first-degree kidnapping and robbery with a dangerous weapon. Defendant was sen-

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tenced to life imprisonment for each first-degree murder and first-degree sexual offense and twelve years for each first-degree kidnapping, all to be served consecutively. Judgment was arrested on the two convictions for robbery with a dangerous weapon. Defendant appeals.

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Defendant raises six issues on appeal: whether the trial court erred by (I & II) refusing to instruct the jury on duress; (III) informing defendant that anything he said at the suppression hearing could be used against him at trial; (IV) denying defendant's motions for a mistrial; (V) allowing the prosecutor to assert during closing arguments that defendant was untruthful; (VI) failing to correct the prosecutor when the prosecutor informed the jury of the law on acting in concert.

*I & II*

**[1]** Defendant argues that the trial court erred by refusing to instruct the jury on duress. We disagree.

"In order to have the court instruct the jury on [a] defense, the defendant must present some credible evidence on every element of the defense." *State v. Smith*, 152 N.C. App. 29, 39, 566 S.E.2d 793, 800 (2002) (citation omitted). "In order to successfully invoke the duress defense, a defendant would have to show that his actions were caused by a reasonable fear that he would suffer immediate death or serious bodily injury if he did not so act." *State v. Cheek*, 351 N.C. 48, 61-62, 520 S.E.2d 545, 553 (1999) (citation and quotations omitted). Although, in North Carolina, duress is not a defense to murder, it is an affirmative defense to kidnapping and robbery. *Id.* at 61, 520 S.E.2d at 553 (citation omitted). "Duress, however, cannot be invoked as an excuse by one who had a reasonable opportunity to avoid doing the act without undue exposure to death or serious bodily harm." *State v. Brown*, 182 N.C. App. 115, 118, 646 S.E.2d 775, 778 (2007) (citation omitted). "To constitute a defense . . . the coercion or duress must be present, imminent or impending, and of such a nature as to induce a well-grounded apprehension of death or serious bodily harm if the act is not done." *Smith*, 152 N.C. App. at 39, 566 S.E.2d at 800 (brackets omitted).

In *Smith*, we considered whether a trial court erred in denying defendant's request to instruct the jury on the defense of duress as a matter of law. Therein the evidence showed the defendant had ample opportunity to avoid participation in a burglary and robbery

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“without undue exposure to death or serious bodily harm.” *Id.* at 40, 566 S.E.2d at 801.

[The] [d]efendant stated that he knew Moore was going to Ms. Todd’s house to get money. Rather than flee, [the] defendant sat in the van while Moore kicked in the kitchen door and went inside. [The] [d]efendant himself then went inside and witnessed the stabbing. While Moore was tying up the victim, [the] defendant did not leave. Instead, he stood and watched until Moore came over to him and, with a knife, threatened to kill [the] defendant and his family. [The] [d]efendant made no attempt to leave while they disposed of the body, and then assisted Moore in taking the guns and jewelry. Finally, he made no attempt to contact the police or surrender the stolen goods, but instead sold them. Accordingly, [the] defendant’s evidence fails to establish the defense of duress . . . .

*Id.*

Here, defendant testified that he voluntarily accompanied Burris and Friday to participate in taking drugs from an unarmed drug dealer with the use of firearms and that, while in the apartment complex, did not object and did not attempt to exit the vehicle as Burris forced two teenage girls into the car. In the vehicle, defendant took jewelry from one girl while Burris pointed a gun at them. Although, in his testimony, defendant stated that Friday was “trigger happy,” defendant did not, prior to the shots being fired that resulted in the death of the two girls, indicate that any coercive measures were directed toward him. Defendant’s testimony regarding his fear of Friday, which he attempts to frame as indicative of coercion or duress, actually only shows threats made by Friday after commission of the acts of kidnapping, robbery, sexual assault and murder. Thus, viewed in a light most favorable to defendant, his testimony does not evidence “a reasonable fear that he would suffer immediate death or serious bodily injury if he did not so act.” *Cheek*, 351 N.C. at 61-62, 520 S.E.2d at 553 (citation omitted). Where defendant begins to participate in a crime or series of crimes as a willing participant, later threats do not retroactively allow him a defense of duress. *See Smith*, 152 N.C. App. at 39-40, 566 S.E.2d at 800-01. Therefore, we hold the trial court did not err in denying defendant’s request for a jury instruction on duress. Accordingly, defendant’s assignments of error are overruled.

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## III

Defendant argues the trial court erred by informing defendant at a suppression hearing that his testimony could be used against him at trial. Defendant argues that as a result, the waiver of his right to testify during the suppression hearing was not knowing, voluntary, or intelligent in violation of his Fifth and Fourteenth Amendment due process rights under the United States Constitution. We dismiss this argument.

In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion.

N.C. R. App. P. 10(b)(1) (2008). "The only exception is when a defendant claims plain error . . . ." *State v. Maness*, 363 N.C. 261, 273, 677 S.E.2d 796, 804 (2009) (internal citations and quotations omitted). "[A] constitutional issue not raised at trial will generally not be considered for the first time on appeal." *Id.* at 279, 677 S.E.2d at 808 (citations omitted).

Here, on appeal, defendant argues that the trial court violated defendant's Fifth and Fourteenth Amendment due process rights by erroneously instructing him that his suppression hearing testimony could be used against him before a jury. Thus, defendant argues, the waiver of his right to testify during the suppression hearing was not knowing, intelligent, and voluntary. This constitutional argument was not presented to the trial court; therefore, we hold this argument is not properly before us. *See* N.C. R. App. P. 10(b)(1). Accordingly, defendant's assignments of error in support of this argument are dismissed.

## IV

[2] Next, defendant argues that the trial court erred by denying defendant's motion for a mistrial after the State twice violated the trial court's order forbidding any mention of polygraph examinations. We disagree.

"Whether a motion for mistrial should be granted is a matter addressed to the sound discretion of the trial judge. A mistrial is

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appropriate only when there are such serious improprieties as would make it impossible to attain a fair and impartial verdict.” *State v. Harris*, 323 N.C. 112, 125, 371 S.E.2d 689, 697 (1988) (citation omitted). Because polygraph results are inherently unreliable, our Supreme Court has held that “such evidence is inadmissible in any criminal or civil trial.” *State v. Willis*, 109 N.C. App. 184, 192, 426 S.E.2d 471, 473 (1993). Apart from objections to the inherent unreliability of the test, “[t]he Court also was disturbed by the possibility that the jury may be unduly persuaded by the polygraph evidence.” *State v. Singletary*, 75 N.C. App. 504, 506, 331 S.E.2d 166, 168 (1985) (citing *State v. Grier*, 307 N.C. 628, 300 S.E.2d 351 (1983)). Although admission of polygraph test results may serve as the basis for reversal on appeal, not every reference to a polygraph test will necessarily result in prejudicial error. *Willis*, 109 N.C. App. 184, 192, 426 S.E.2d 471, 473 (citations omitted).

Here, the State filed a pre-trial Motion *In Limine* Concerning Polygraph Examination. In said motion, the State included the following averments:

2. As part of the investigation, Myron Burris agreed to submit to a polygraph examination. The examination was conducted on July 11, 1994 and the results indicated that he failed the polygraph.

...

[Pursuant to *State v. Grier*, 307 N.C. 628 (1983) and *State v. Fleming*, 350 N.C. 109 (1999)] the State moves this Court to preclude the defense from any and all inquiry, evidence, showing and / or statement regarding Myron Burris’s or any other individual’s participation in the polygraph examination . . . .

The trial court orally granted the State’s motion.

At trial, Burris testified for the State. During his testimony, the trial court admitted into evidence an audio recording and transcript of his interview with law enforcement on 27 December 2005. Following the admission of the recording and transcript, the State introduced a copy of Burris’ nonattribution agreement, also signed 27 December 2005, which Burris described as a form agreement he signed acknowledging that he would give a true statement. The nonattribution agreement included the following statement: “4) Information provided by Mr. Burris pursuant to this Agreement may be verified by polygraph examination or any other method chosen by the

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State.” In addition, the trial court also admitted, absent objection, and published to the jury an audio recording and transcript of Burris’ 17 May 2004 interview with F.B.I. Special Agent Raymond Duda.

During the 17 May 2004 interview, Burris engaged in the following discussion:

FBI: Did you take a polygraph back then?

Burris: Yes.

FBI: Do you remember who gave you the polygraph? Where . . . where did the polygraph occur?

Burris: At Brown Creek Corrections.

FBI: Oh, Brown Creek?

Burris: Yeah.

FBI: Did they tell you how . . . how you . . . how you did on the polygraph?

Burris: Uh, no they didn’t . . . they didn’t say nothing about it. They just . . . they just left and I hear from them eight years later.

After publication to the jury, defendant argued that the admission of the nonattribution agreement, with its unredacted reference to a polygraph examination, opened the door to a cross-examination of Burris on the issue of the polygraph examination.

The trial court observed that according to the nonattribution agreement the information provided by Burris could be verified by the State’s choice of methods but the agreement gave no indication Burris took or passed a polygraph exam. Moreover, in his 17 May 2004 interview, though Burris acknowledged that he took a polygraph, he stated that he was not made aware of the results. On those grounds, defendant’s request to cross-examine Burris on the issue of the polygraph examination was denied; however, the trial court inquired as to whether defendant would like the jury to be instructed that the proffer of information regarding the polygraph was not competent evidence for their consideration and was to be disregarded. Defendant declined the instruction. Instead, defendant made a motion to have the 17 May 2004 statement stricken and an instruction given that the jury was not to consider any of that information, as well as a motion for a mistrial. Defendant’s motions were denied. We hold that the trial

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court did not abuse its discretion in denying defendant's motion for a mistrial. While we disapprove of the State's actions in submitting to the jury unredacted exhibits containing references to a polygraph examination, such exhibits did not contain any evidence of the results of the polygraph examination. *See Harris*, 323 N.C. 112, 371 S.E.2d 689 (holding that the impropriety in mentioning the defendant was asked if he would take a polygraph was not so egregious as to render the jury incapable of an impartial verdict); *compare State v. Moose*, 115 N.C. App. 707, 446 S.E.2d 112 (1994) (granting new trial where prosecutor deliberately inquired whether the defendant was offered a polygraph in direct contravention of a trial court order to refrain from any mention of a polygraph exam because "the chance of prejudice [was] so great."). Accordingly, defendant's assignments of error are overruled.

## V

[3] Next, defendant argues that the trial court erred by failing to intervene *ex mero motu* when, during closing arguments, the prosecutor asserted that defendant was lying. We disagree.

"The arguments of counsel are left largely to the control and discretion of the trial judge, and counsel will be granted wide latitude in the argument of hotly contested cases." *State v. Ocasio*, 344 N.C. 568, 579, 476 S.E.2d 281, 287 (1996) (citation omitted). "The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002) (citation omitted).

To constitute reversible error: the prosecutor's remarks must be both improper and prejudicial. Improper remarks are those calculated to lead the jury astray. Such comments include references to matters outside the record . . . Improper remarks may be prejudicial either because of their individual stigma or because of the general tenor of the argument as a whole.

*State v. Nguyen*, 178 N.C. App. 447, 457, 632 S.E.2d 197, 204 (2006) (citation omitted). "In determining whether the prosecutor's argument was grossly improper, the Court must examine the argument in the context in which it was given and in light of the overall factual circumstances to which it refers." *Ocasio*, 344 N.C. at 580, 476 S.E.2d at 288 (citation omitted).

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Here, the prosecutor stated the following:

You can look at that statement and when you do you know that when Detective Ward got up there on the stand and said we didn't believe him, you can see why, because it's in that statement. He was lying. . . . But later he found out that this statement means he's guilty of kidnapping, robbery, sex offense and murder. What can he do? Well, somehow he's got to get rid of this statement, this statement that he gave of his own free will.

. . .

He's had four year[s], ladies and gentlemen, to think about what he would say. He's had access to all the [d]iscovery, the complete investigation. And he used that to craft this story because that's what he told you when he took the stand, he told you a story.

After reviewing the record and the context of the prosecutor's argument, we hold that the comments were not so grossly improper as to allow a finding that the trial court committed reversible error by failing to intervene *ex mero motu*. See *Jones*, 355 N.C. at 133, 558 S.E.2d at 107. Accordingly, defendant's assignments of error are overruled.

## VI

[4] Next, defendant argues the trial court abused its discretion by failing to sustain defendant's objection to the prosecutor's characterization of the law on acting in concert during closing arguments. We disagree.

"The standard of review for improper closing arguments that provoke timely objection from opposing counsel is whether the trial court abused its discretion by failing to sustain the objection." *Jones*, 355 N.C. at 131, 558 S.E.2d at 106 (citations omitted).

When applying the abuse of discretion standard to closing arguments, this Court first determines if the remarks were improper. . . . [I]mproper remarks include statements of personal opinion, personal conclusions, name-calling, and references to events and circumstances outside the evidence, such as the infamous acts of others. Next, we determine if the remarks were of such a magnitude that their inclusion prejudiced defendant, and thus should have been excluded by the trial court.

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*Id.* at 131, 558 S.E.2d at 106 (citation omitted). “Incorrect statements of law in closing arguments are improper . . . .” *State v. Ratliff*, 341 N.C. 610, 616, 461 S.E.2d 325, 328 (1995).

Here, the prosecutor made the following statements during closing arguments:

[Prosecutor]: I told you all that this is not a conspiracy case. We don’t have to prove that these men joined up together for a common purpose and that they intended the purpose to be carried out. That’s conspiracy.

[Defense]: Objection.

The Court: Overruled.

. . .

[Prosecutor]: Joining together doesn’t have to be through words, it can be through actions. . . . These men made an agreement earlier in the evening to commit the robbery. When that didn’t work out for them, they picked a new target and they joined together to put those girls in the car. They joined together to kidnap them . . . [b]y virtue of doing that, again, under our law, that is acting in concert.

The trial court gave the following instruction to the jury with respect to the doctrine of acting in concert:

Court: For a person to be guilty of a crime, it is not necessary that he personally do all of the facts necessary to constitute the crime. If two or more persons join in the common purpose to commit a crime, each of them, if actually or constructively present is not only guilty of that crime if the other person commits the crime but is also guilty of any other crime committed by the other in pursuance of the common purpose to commit that crime or as a natural or probable consequence thereof.

We hold this instruction is consistent with North Carolina law and cures any prejudice from the prosecutor’s comments. *See State v. Roache*, 358 N.C. 243, 306, 595 S.E.2d 381, 421 (2004) (the doctrine of acting in concert “allows a defendant acting with another person for a common purpose of committing some crime to be held guilty of a

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[crime] committed in the pursuit of that common plan even though the defendant did not personally commit the [crime].”). Accordingly, defendant’s assignments of error are overruled.

No prejudicial error.

Judges WYNN and HUNTER, Robert C., concur.

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STATE OF NORTH CAROLINA v. LETISHA DAWN BEAM

No. COA09-422

(Filed 5 January 2010)

**1 Drugs— trafficking by delivery—actual delivery not required**

An attempted delivery of a controlled substance satisfied the statutory definition of delivery. Actual delivery was not required.

**2. Drugs— trafficking 28 grams—sufficiency of evidence—prescription bottles**

The trial court correctly denied defendant’s motion to dismiss charges of trafficking in 28 grams of an opium derivative where the tablets were found in prescription bottles. The prescription labels were nearly a year old and defendant offered no evidence that she had not taken any of the tablets. Taken in the light most favorable to the State, the evidence did not establish that defendant was entitled to the statutory exemption from prosecution; the trial court correctly submitted to the jury the issue of whether defendant was authorized to possess the tablets.

**3. Criminal Law— entrapment—not established as a matter of law**

The trial court correctly denied defendant’s motion to dismiss a narcotics prosecution based on the defense of entrapment, and properly submitted the issue to the jury, where defendant agreed to sell the drugs the same day that she encountered the confidential informant at a treatment clinic, there was no series of meetings or ensuing bonding conversations, and defendant had already taken a drug the day before and cannot argue that she was induced back into her drug habit with the promise of tablets.

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The undisputed testimony and required inferences did not compel a finding that defendant was induced to commit an act which she was not predisposed to commit.

Appeal by defendant from judgment entered 10 October 2008 by Judge Mark E. Klass in Cabarrus County Superior Court. Heard in the Court of Appeals 30 September 2009.

*Attorney General Roy Cooper, by Assistant Attorney General David W. Boone, for the State.*

*Robert W. Ewing for defendant-appellant.*

STEELMAN, Judge.

Under the language of N.C. Gen. Stat. § 90-87(7), an attempted delivery of a controlled substance satisfies the statutory definition of delivery. While the State bore the burden of proof to establish the elements of drug offenses under N.C. Gen. Stat. § 90-95, defendant was required to prove an exemption from prosecution under N.C. Gen. Stat. § 90-113.1(a). Defendant's evidence did not establish as a matter of law that she was legally authorized to possess the Lortab tablets. When the evidence presented did not compel a holding that defendant was induced into taking an action which she was not predisposed to take, the trial court correctly held that defendant was not entitled to the dismissal of the charges based upon entrapment, and submitted the issue to the jury.

**I. Factual and Procedural Background**

Letisha Dawn Beam (defendant) is a recovering drug addict. On Saturday 5 November 2005, defendant drove to the McLeod Center, a narcotic treatment clinic, to receive her daily dose of methadone. Defendant also received an additional dose of methadone since the McLeod Center is closed on Sundays. Defendant saw Randy Davis (Davis) while waiting in line. Davis was working as a confidential informant with the Kannapolis Police Department. He told defendant that if she would give him a ride, he would give her some Klonopin tablets. Defendant did not give Davis a ride, but did give him her cell phone number.

Later that afternoon, defendant checked her cell phone and discovered that Davis had "left a bunch of messages," wanting defendant to come to his residence. Defendant drove to Davis' residence, and they took ten to fifteen Klonopin tablets. Defendant had also taken

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Xanax earlier that day. While defendant was at Davis' residence, Davis called a person he described as his brother.

The person Davis actually called was Detective Tim Roth (Detective Roth). Detective Roth works in the vice/narcotics unit of the Kannapolis Police Department, and his job duties include working undercover as either a drug user or seller. Defendant spoke on the phone with Detective Roth and discussed the sale of Lortab tablets and liquid methadone. Detective Roth testified that defendant identified herself as "Letisha" and told him that she would sell seventy-five hydrocodone tablets (Lortab) for five dollars per tablet and some liquid methadone for one hundred dollars. Defendant confirmed to Detective Roth that one of the bottles of methadone was still sealed.

Defendant and Detective Roth agreed to meet in the parking lot of a Circle K store to transfer the drugs. Detective Roth informed his supervisor, Lieutenant Pat Patty (Lieutenant Patty), of the agreement and asked Lieutenant Patty to provide back-up and to operate audio equipment. Lieutenant Patty monitored the transaction by listening to a "wire," which Detective Roth wore during the transaction.

Detective Roth wore plain clothes and drove an unmarked, red Expedition to the Circle K parking lot. Lieutenant Patty wore his police uniform, drove a marked patrol vehicle, and parked at Rowan-Cabarrus Community College, which is next to the Circle K. A short time later, defendant pulled into the Circle K parking lot in a black vehicle. Davis was in the passenger seat of defendant's vehicle.

Davis exited defendant's vehicle and went inside the store, and Detective Roth got into defendant's vehicle. Detective Roth asked defendant where the drugs were, and she told him that the drugs were in the trunk of her vehicle. Defendant exited the vehicle, went to the trunk, and returned with her purse, which contained two amber pill bottles and the liquid methadone. Detective Roth exited the vehicle and told defendant he needed to get the money. He opened his vehicle door and gave Lieutenant Patty the code word signaling that the deal was completed. Detective Roth got back into defendant's vehicle, and she told him to put the money on the dashboard. Detective Roth testified that defendant never touched the money. Lieutenant Patty drove his patrol vehicle beside defendant's vehicle, and Detective Roth told her that she was under arrest. At the time she was arrested, defendant had the two pill bottles in one hand and a bottle of methadone in the other hand. Detective Roth also recovered another bottle of methadone from defendant's purse.

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Defendant waived her Miranda rights and gave a voluntary statement to Detective Roth. Several items were seized as evidence, including two “plastic containers counting a total of seventy three blue capsule shaped tablets with imprint Watson 550,” and two plastic containers containing a red liquid. These items were sent to the North Carolina SBI lab for analysis.

Agent Lisa Edwards (Agent Edwards), a forensic drug chemist, testified for the State. Agent Edwards stated it was her opinion that the seventy-three blue capsule-shaped tablets were Lortab, Schedule II hydrocodone, which is an opium derivative. The tablets had a total weight of 47.44 grams. She further stated it was her opinion that the two bottles containing red liquid were methadone, a Schedule II controlled substance.

Defendant was indicted on one count of felonious possession of methadone with intent to sell and deliver, and one count of trafficking opium or an opium derivative by possession, one count of trafficking opium or an opium derivative by transportation, and one count of trafficking opium or an opium derivative by delivery. Defendant was found guilty of all charges. The offenses were consolidated for judgment, and defendant was sentenced to an active prison term of 225 to 279 months.

Defendant appeals.

## II. Motion to Dismiss

Defendant brings forward three arguments on appeal, all of which are based on the trial court’s denial of her motion to dismiss at the conclusion of all the evidence based upon insufficiency of the evidence. We discuss each in turn.

### A. Standard of Review

The denial of a motion to dismiss for insufficient evidence is a question of law, which this Court reviews *de novo*. *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007) (citations omitted). The question for this Court upon review is “ ‘whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant’s being the perpetrator of such offense. If so, the motion is properly denied.’ ” *State v. Blizzard*, 169 N.C. App. 285, 289, 610 S.E.2d 245, 249 (2005) (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)). Evidence is substantial if it is relevant, not seeming or

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imaginary, and a reasonable mind might accept it as adequate to support a conclusion. *State v. Thaggard*, 168 N.C. App. 263, 281, 608 S.E.2d 774, 786 (2005) (citations omitted). In considering the motion, the trial court must view the evidence in the light most favorable to the State and give the State every reasonable inference. *Id.* (citing *State v. Gibson*, 342 N.C. 142, 150, 463 S.E.2d 193, 199 (1995)). “Contradictions and discrepancies must be resolved in favor of the State, and the defendant’s evidence, unless favorable to the State, is not to be taken into consideration.” *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 388 (1984) (internal citations omitted). Because defendant presented evidence at trial, she waived her right to appeal the denial of her motion to dismiss at the close of the State’s evidence; therefore, only the motion to dismiss at the close of all the evidence is before this Court. *State v. Mash*, 328 N.C. 61, 66, 399 S.E.2d 307, 311 (1991) (citing *Bullard*, 312 N.C. 129, 322 S.E.2d 370).

B. Trafficking an Opium Derivative by Delivery

[1] In her first argument, defendant contends the trial court erred in denying her motion to dismiss the charge of trafficking in an opium derivative by delivery based on insufficiency of the evidence, arguing that no actual delivery occurred. We disagree.

A person is guilty of the Class C felony of trafficking in an opium derivative by delivery if that person:

- (1) knowingly delivered an opium derivative to another person
- (2) the amount delivered was twenty-eight grams or more

N.C. Gen. Stat. § 90-95(h)(4) (2007)<sup>1</sup>; *see also* N.C.P.I.—Crim. 260.23 (2009).

Defendant only argues that no actual delivery occurred; she makes no argument that she was not in possession of the drugs, nor that she did not attempt to deliver the drugs. For purposes of the North Carolina Controlled Substances Act, delivery “means the actual constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship.” N.C. Gen. Stat. § 90-87(7) (2007).

In *State v. Thrift*, we held that N.C. Gen. Stat. § 90-87(7) does not require an “actual delivery.” This Court stated that a “delivery” occurs

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1. This statute was modified by 2009 N.C. Sess. Laws 463 and 2009 N.C. Sess. Laws 473, but neither modified the above-cited portion of the statute.

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when there is an actual, constructive, or attempted transfer from one person to another of a controlled substance. *Thrift*, 78 N.C. App. 199, 201, 336 S.E.2d 861, 862 (1985) (quoting *State v. Creason*, 313 N.C. 122, 129, 326 S.E.2d 24, 28 (1985)), *appeal dismissed and disc. review denied*, 316 N.C. 557, 344 S.E.2d 15 (1986).

To prove an “attempt,” there must be substantial evidence that defendant intended to commit the offense and performed an overt act, beyond mere preparation, but fell short of completing the offense. *State v. Shook*, 155 N.C. App. 183, 187, 573 S.E.2d 249, 252 (2002) (citing *State v. Gray*, 58 N.C. App. 102, 106, 293 S.E.2d 274, 277, *disc. review denied*, 306 N.C. 746, 295 S.E.2d 482 (1982)). In the instant case, defendant admitted to getting out of her vehicle, going to the trunk of her vehicle, and retrieving her purse, which contained the drugs. The State presented evidence through Detective Roth’s testimony that she then re-entered the vehicle, took the drugs out of her purse, and told Detective Roth to put the money on the dashboard of her vehicle. Defendant was arrested before handing Detective Roth the drugs. This testimony, viewed in the light most favorable to the State, was sufficient to support submission of this offense to the jury.

By the plain language of the statute, an attempted delivery of a controlled substance satisfied the statutory definition of delivery. N.C. Gen. Stat. § 90-87(7) (2007). No “actual delivery” was required. Consequently, we find no error in the trial court’s denial of defendant’s motion to dismiss the charge of trafficking in an opium derivative by delivery.

This argument is without merit.

C. Trafficking Twenty-Eight Grams of Opium by Possession,  
Delivery and Transportation

[2] In her second argument, defendant contends that the trial court erred in denying her motion to dismiss the charges of trafficking twenty-eight grams or more of an opium derivative by possession, transportation and delivery based on the insufficiency of the evidence because a portion of the opium derivative in defendant’s possession was legally prescribed to her. We disagree.

Defendant was convicted of the Class C felony of trafficking in an opiate derivative weighing twenty-eight grams or more. Defendant argues that if the number of tablets that were legally prescribed to her are excluded, the weight would be below twenty-eight grams. This would reduce the offense from a Class C felony to a Class E felony,

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and require the imposition of a shorter sentence. N.C. Gen. Stat. § 90-95(h)(4)(b); -95(h)(4)(c) (2007)<sup>2</sup>.

N.C. Gen. Stat. § 90-95 makes the possession, transportation or delivery of a controlled substance a crime. Opium, and its derivatives, is a Schedule II controlled substance. N.C. Gen. Stat. § 90-90(1)(a); -90(1)(b) (2007). The possession, transportation or delivery of an opium derivative is unlawful unless it is authorized under an appropriate section of the Controlled Substances Act. N.C. Gen. Stat. § 90-95(a) (2007). “[O]ne may be exempt from State prosecution for the possession or the sale or delivery of controlled substances if that person is authorized by the North Carolina Controlled Substances Act to so possess or sell or deliver such substances.” *State v. McNeil*, 47 N.C. App. 30, 38, 266 S.E.2d 824, 829 (1980) (citations omitted), *appeal dismissed and disc. review denied*, 301 N.C. 102, 273 S.E.2d 306 (1980).

The State “carries the burden of proof—beyond a reasonable doubt—in all criminal cases.” *State v. Little*, 191 N.C. App. 655, 661, 664 S.E.2d 432, 436-37, *disc. review denied*, 362 N.C. 685, 671 S.E.2d 326 (2008). However, in a prosecution under N.C. Gen. Stat. § 90-95, it is the defendant’s burden to establish that an exemption from its provisions is applicable. N.C. Gen. Stat. § 90-113.1 provides:

(a) It shall not be necessary for the State to negate any exemption or exception set forth in this Article in any complaint, information, indictment, or other pleading or in any trial, hearing, or other proceeding under this Article, and the burden of proof of any such exemption or exception shall be upon the person claiming its benefit.

N.C. Gen. Stat. § 90-113.1(a) (2007). This section does not shift the burden of proof from the State to establish all the necessary elements of an offense under Chapter 90; it merely places the burden of proof on defendant to establish that she is entitled to an exemption under its provisions. *McNeil*, 47 N.C. App. at 40, 266 S.E.2d at 829.

In the instant case, defendant argues that “she was partially exempt from [N.C. Gen. Stat. § 90-95(h)(4)(c)] because forty of the hydrocodone pills seized from her person were legally prescribed to her.” The two pill bottles obtained from defendant each had prescription labels for a total of forty pills. Detective Roth testified that one

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2. This statute was modified by 2009 N.C. Sess. Laws 463 and 2009 N.C. Sess. Laws 473, but neither modified the above-cited portion of the statute.

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of the prescription labels was dated 3 January 2005 and in defendant's name for a total of twenty Lortab tablets. The "use-before" date was 3 January 2006. The second pill bottle had a prescription label dated 10 February 2005 in defendant's name for a total of twenty Lortab tablets. The "use-before" date was 10 February 2006.

Defendant testified that she received prescriptions for Lortab tablets from three physicians: Dr. Fruchtmann, Dr. Furr, and Dr. Gibbs. This testimony was only corroborated as to Dr. Gibbs, whose office manager, Lisa Lampton (Lampton), testified at trial. Lampton testified that defendant was prescribed twelve tablets on 15 October 2001 and another twelve tablets on 1 November 2001. Lampton further testified that after those two prescriptions, defendant was not seen by Dr. Gibbs' office again until 2006.

This was the only evidence offered by defendant to prove that she was authorized to possess the controlled substances. No testimony was presented as to what physician issued the prescriptions for the tablets contained in the two pill bottles seized by Detective Roth, and the labels from the two pill bottles were not included in the record on appeal. We note that the prescription labels on the two pill bottles were nearly a year old on the date of defendant's arrest. Defendant offered no evidence or testimony that she had not taken any of the Lortab tablets prescribed to her in January and February 2005. No evidence was presented that she was authorized to sell or deliver the controlled substances.

Whenever a defendant puts on evidence, it is not to be considered by the trial court upon defendant's motion to dismiss unless favorable to the State. *Bullard*, 312 N.C. at 160, 322 S.E.2d at 388. The evidence presented, taken in the light most favorable to the State, failed to establish that she was entitled, as a matter of law, to an exemption under the provisions of N.C. Gen. Stat. § 90-113.1. The trial court did not err by denying defendant's motion to dismiss, and the issue of whether defendant was authorized to possess forty Lortab tablets was correctly submitted to the jury. It was within the province of the jury to weigh the credibility of the testimony and decide whether defendant was authorized to possess a portion of the Lortab tablets. See *State v. Moore*, 188 N.C. App. 416, 422, 656 S.E.2d 287, 291 (2008) (citations and quotations omitted).

This argument is without merit.

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D. Entrapment

[3] In her third argument, defendant contends that the trial court erred in denying her motion to dismiss based upon insufficiency of the evidence because the evidence established the defense of entrapment as a matter of law. We disagree.

It is the general rule that where the criminal intent and design originates in the mind of one other than the defendant, and the defendant is, by persuasion, trickery or fraud, incited and induced to commit the crime charged in order to prosecute him for it, when he would not have committed the crime, except for such incitements and inducements, these circumstances constitute entrapment and a valid defense.

*State v. Stanley*, 288 N.C. 19, 28, 215 S.E.2d 589, 595 (1975) (citations omitted). Entrapment is an affirmative defense, and the burden of proof lies with defendant. *State v. Hageman*, 307 N.C. 1, 28, 296 S.E.2d 433, 448 (1982); *see also* N.C.P.I.-Crim. 309.10 (2009).

Entrapment is not available as a defense if defendant has a predisposition to commit the crime, independent of any governmental inducement and influence. *Hageman*, 307 N.C. at 29, 296 S.E.2d at 449. “The fact that governmental officials merely afford opportunities or facilities for the commission of the offense is, standing alone, not enough to give rise to the defense of entrapment.” *Id.* at 30, 296 S.E.2d at 449 (citing *Sorrells v. United States*, 287 U.S. 435, 77 L. Ed. 413 (1932)). If the evidence raises the issue of entrapment, it is ordinarily a question of fact for the jury, but the trial court can find entrapment as a matter of law when the undisputed testimony and required inferences compel a finding that defendant was induced by the government officials into an action for which he was not predisposed to take. *Stanley*, 288 N.C. at 30, 215 S.E.2d at 597 (citations omitted).

Defendant argues that she was “enticed by the confidential informer to not only sell narcotics but also by luring the defendant into her drug habit by providing the narcotic Klonopin to her.” She cites the case of *Sherman v. United States*, 356 U.S. 369, 2 L. Ed. 2d 848 (1958) in support of her argument of entrapment. In *Sherman*, the government informant had several meetings with defendant, many discussions of mutual experiences and problems, and repeated requests to obtain narcotics for the government informant. *Id.* at 371, 2 L. Ed. 2d at 850. The United States Supreme Court focused on the number of meetings and conversations between defendant and the

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informant, and the fact that the government informant formed a bond with defendant and acted upon defendant's sympathy. *Id.* at 373, 2 L. Ed. 2d at 851-52.

In the instant case, defendant agreed to sell the drugs the same day that she encountered Davis at the McLeod Center. She testified that Davis was "a friend of my son's father's." She further testified that she did not know how to get to Davis' residence, and he had to meet her at the McLeod Center and give her directions. There were no series of meetings or ensuing bonding conversations between defendant and Davis. Neither can defendant argue that she was induced to commit the crime because Davis lured her back into her drug habit with the promise of Klonopin tablets. She testified that she had taken Xanax earlier that day before meeting Davis. We hold *Sherman* to be inapposite. This case is more factually similar to that of *State v. Duncan*, 75 N.C. App. 38, 330 S.E.2d 481, *disc. review denied*, 314 N.C. 544, 335 S.E.2d 317 (1985).

In *Duncan*, defendant "readily agreed to obtain cocaine" for the undercover agent when requested to do so. *Id.* at 46, 330 S.E.2d at 487. Defendant contacted the undercover agent and gave her a phone number and directions to a hotel where the sale was to take place. Defendant then met the undercover agent and directed her to a specific room where the cocaine was hidden. At trial, defendant raised the defense of entrapment. This Court stated that predisposition to commit a crime " 'may be shown by a defendant's ready compliance, acquiescence in, or willingness to cooperate in the criminal plan where the police merely afford the defendant an opportunity to commit the crime.' " *Id.* at 47, 330 S.E.2d at 487-88 (quoting *Hageman*, 307 N.C. at 31, 296 S.E.2d at 450).

In the instant case, the undisputed testimony and required inferences did not compel a finding that defendant was induced to commit an act which she was not predisposed to commit. *Stanley*, 288 N.C. at 32, 215 S.E.2d at 597. Defendant readily agreed to participate in the drug transaction and to sell Lortab tablets and methadone to Detective Roth. She testified that no one forced her to take Klonopin tablets at Davis' residence, and she drove herself to the Circle K to sell the drugs to Detective Roth. Detective Roth testified that defendant was the one who set the price for the sale of both the Lortab tablets and the methadone. The evidence establishes that defendant readily agreed to sell the narcotics, and Detective Roth merely afforded her an opportunity to do so.

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Whenever a defendant puts on evidence, it is not to be taken into consideration by the trial court upon defendant's motion to dismiss unless favorable to the State. *Bullard*, 312 N.C. at 160, 322 S.E.2d at 387-88. The evidence presented, viewed in the light most favorable to the State, failed to establish that she was entitled to the defense of entrapment as a matter of law. The trial court did not err by denying defendant's motion to dismiss, and the issue of entrapment was properly submitted to the jury. It was within the province of the jury to weigh the credibility of the testimony. They chose not to believe defendant and concluded she had not met her burden of proof establishing the defense of entrapment. See *Moore*, 188 N.C. App. at 422, 656 S.E.2d at 291.

This argument is without merit.

Defendant has failed to argue her remaining assignments of error in her brief, and they are thus deemed abandoned pursuant to Rule 28(b)(6) of the Rules of Appellate Procedure.

NO ERROR.

Judges McGEE and JACKSON concur.

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RONALD SELF, DONNA K. SELF REYNOLDS, AND THE ESTATE OF COLEMAN FRANKLIN SELF, BY ITS EXECUTIVES, RONALD SELF AND DONNA K. SELF REYNOLDS, PLAINTIFFS v. ROBERT W. YELTON, DEFENDANT

No. COA09-207

(Filed 5 January 2010)

**1. Attorneys— professional negligence—summary judgment—insufficient evidence of proximate cause**

The trial court did not err by granting defendant attorney summary judgment on plaintiffs' claims for professional negligence, fraud, constructive fraud, and obstruction of justice because plaintiffs could not show that the affidavit at issue proximately caused plaintiffs any injury.

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**2. Statutes of Limitation and Repose— expired—summary judgment proper**

The trial court did not err in granting summary judgment in favor of defendant attorney where plaintiffs' claims for professional negligence, fraud, and obstruction of justice expired prior to the filing of their complaint.

**3. Fraud— constructive—insufficient evidence of benefit**

The trial court did not err in granting summary judgment in favor of defendant attorney on plaintiffs' claim for constructive fraud because plaintiffs failed to present sufficient evidence that defendant sought to benefit himself in the transaction.

Appeal by plaintiffs from order entered 31 October 2008 by Judge Richard L. Doughton in Cleveland County Superior Court. Heard in the Court of Appeals 3 September 2009.

*Ferguson, Stein, Chambers, Gresham & Sumter, P.A., by John W. Gresham and Tanisha P. Johnson, for plaintiff-appellants.*

*Dean & Gibson, PLLC, by Rodney Dean and Sarah M. Bowman, for defendant-appellee.*

HUNTER, JR., Robert N., Judge.

Ronald Self, Donna K. Self, and the estate of Coleman Self (collectively "plaintiffs") filed this suit against Robert W. Yelton ("defendant") for alleged wrongful acts and omissions by defendant during his representation of Coleman Self ("Coleman"). Plaintiffs contend that defendant's professional negligence, fraud, or breach of duty in representing Coleman proximately caused Coleman's estate and heirs to lose a remaindermen interest in a parcel of real estate. Plaintiffs herein settled a quiet title action to the aforementioned parcel in a prior lawsuit; however, their damage claim is that the settlement obtained in the prior lawsuit was less than would have been obtained but for defendant's negligence, fraud, or breach of duty. The trial court granted defendant summary judgment on plaintiffs' claims for professional negligence, fraud, constructive fraud, and obstruction of justice. We affirm.

**I. BACKGROUND****A. The Prior Lawsuit: *Conlon v. Self***

In *Conlon v. Self*, No. 03-247, 2003 WL 23109719 (N.C. App. Jan. 6, 2004) [*Conlon*], this Court addressed plaintiffs' claim to a parcel of

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property located at 205 Birdie Lane, Shelby, North Carolina (the “Birdie Lane property”). *Conlon* was an action instituted by Frances Self (“Frances”), Coleman’s widow, to quiet title to Birdie Lane after Coleman’s death in January 2000. Plaintiffs were the defendants in that case. Title to the Birdie Lane property was the sole dispute in *Conlon*, and after *Conlon* was decided, the Birdie Lane property was the subject of a consent judgment dated 25 June 2004. In the settlement, plaintiffs herein: (1) quitclaimed their interest in the Birdie Lane property; and (2) received a right of first refusal to buy Birdie Lane at the end of Frances’ possession, or if the property sold to a third party, a right to receive 30% of the sales proceeds. In releasing their claims in *Conlon*, plaintiffs’ consent judgment provided in relevant part:

[Plaintiffs], being of lawful age, for the mutual consideration addressed above, . . . [do] hereby and for [our] heirs, executors, administrators[,] successors, agents and assigns release, acquit and forever discharge one from the other, any and all claims which the undersigned now has/have or which may hereafter accrue on account of or in any way growing out of any and all known and unknown, foreseen or unforeseen damages or loses [sic] and the consequences thereof resulting or to result from the marriage of Coleman Self and Frances Self, or any transactions between them, related to the marriage or not, and specifically all claims related to the allegations in the lawsuit contained in file #01 CVS 1852 or any claims regarding property owned by the parties together or separately.

Coleman and Frances purchased the Birdie Lane property as tenants by the entirety in March 1995. The day of the Birdie Lane closing, defendant prepared and Frances executed a standard statutory form power of attorney (the “March 1995 power of attorney”) naming Coleman her attorney-in-fact. The March 1995 power of attorney did not provide Coleman the power to gift Frances’ individual property to himself.

In 1999, just prior to his death, Coleman attempted to use the March 1995 power of attorney to transfer, without consideration, Frances’ entireties interest in the Birdie Lane property to himself. Coleman retained an attorney other than defendant to prepare a deed giving him sole ownership of Birdie Lane, and on 2 June 1999, Coleman signed the deed “as ‘Frances S. Kuykendall, by Coleman Franklin Self, POA.’” *Conlon*, No. 03-247, 2003 WL 23109719, at \*1.

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Coleman died on 2 January 2000. His probated will, which was prepared by defendant in November 1997 (the “November 1997 will”), provided that Frances would be granted a life estate in Coleman’s real property with the remainder going to Coleman’s children, Ronald and Donna Self (the “Selfs”).

After Coleman’s death in 2000, Peggy Conlon, as attorney-in-fact for Frances,<sup>1</sup> filed the complaint in *Conlon* to quiet title to the Birdie Lane property. Plaintiffs argued in *Conlon* that the June 1999 deed conveyed Coleman sole ownership of the Birdie Lane property. The implication of this argument was that the Birdie Lane property passed to them after Coleman’s death by virtue of the November 1997 will. Peggy Conlon argued that the June 1999 deed was null and void because the March 1995 power of attorney did not grant Coleman the ability to gift Frances’ property to himself.

On 21 August 2002, the trial court granted Peggy Conlon’s motion for summary judgment, and ordered that the June 1999 deed be set aside and cancelled. Plaintiffs appealed the trial court’s summary judgment order in *Conlon* to this Court, and after *de novo* review, we affirmed, holding: (1) the March 1995 power of attorney did not authorize Coleman to gift the Birdie Lane property to himself; and (2) because no valuable consideration was paid for the transfer, the June 1999 deed transferring the Birdie Lane property to Coleman individually was a gift not authorized by the March 1995 power of attorney. *Conlon*, No. 03-247, 2003 WL 23109719, at \*2-3.

B. The Current Action: *Self v. Yelton*

On 8 July 2005, after the consent judgment was entered in *Conlon*, plaintiffs filed this action against defendant. In their complaint, plaintiffs state four causes of action: professional negligence, fraud, constructive fraud, and obstruction of justice. Defendant denied liability in his answer, and pled the affirmative defenses of failure to state a claim under Rule 12(b)(6), statute of limitations, and election of remedies.

The timeliness of each of plaintiffs’ claims hinges upon the legal significance of an affidavit prepared in July 2002 by defendant (the “July 2002 affidavit”). Peggy Conlon used the July 2002 affidavit to

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1. Frances created a second power of attorney naming Peggy Conlon her attorney-in-fact on 30 January 1996. A revocation of the power of attorney to Coleman was also executed, but it was never filed. These documents were prepared by defendant, but did not affect our decision in *Conlon*, and are not relevant to the analysis here.

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support her motion for summary judgment in *Conlon*. The affidavit states in pertinent part:

2. I have represented Franc[e]s S. Self for many years and when she married Coleman F. Self, I began doing legal work for both Mr. and Mrs. Self. I prepared a pre-marital agreement for the Selves and had prepared various other legal documents on behalf of the Selves over the years leading up to Mr. Self's death. Sometime in September of 1997 I was asked by Coleman Self to prepare a deed transferring the home owned by Coleman and Franc[e]s Self on 205 Birdie Lane from Coleman F. Self, and wife, Francis S. Self, to Coleman F. Self, individually. I followed his instructions and prepared such a deed and met with Mr. and Mrs. Self to have the deed executed.

3. When I presented the deed to Franc[e]s S. Self, and explained to Mrs. Self the nature of the deed, she refused to sign the deed. She made it very clear to me that she did not wish to transfer the property out of her name to Mr. Coleman F. Self individually.

4. When Franc[e]s Self refused to sign the deed I explained to Mr. and Mrs. Self that I could take no further action with respect to the transfer of the property. It was quite clear that Franc[e]s Self did not desire to transfer the home at 205 Birdie Lane to Coleman Self.

5. At the time that Mr. Self asked me to prepare the deed, the property was owned by Coleman F. Self, and wife Francis S. Self as tenants by the entireties.

Based on the contents of this affidavit, plaintiffs contend that defendant breached an ethical duty to his client, Coleman, and Coleman's beneficiaries, the Selves, by failing to keep confidential client communications. In revealing these communications by affidavit, plaintiffs contend that defendant "repudiated" Coleman's wishes as shown in his November 1997 will. Plaintiffs argue that the November 1997 will should have left the Selves a remainder interest in the Birdie Lane property; and therefore, defendant proximately caused plaintiffs' damage by causing their remainder interest in the Birdie Lane property to go to Frances in fee simple.

Plaintiffs further contend that defendant committed fraud, constructive fraud, and obstruction of justice, because the statements made in the affidavit were misleading and false. To support this con-

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tention, plaintiffs claim that defendant could not have had the conversations with Frances reported in the July 2002 affidavit due to her mental incompetence at the time the conversations were to have taken place. They also contend that evidence of the incompetence of Frances was not discovered until after the trial court's order granting summary judgment in *Conlon* had been rendered. Plaintiffs allege they discovered documents showing that defendant knew that Frances was experiencing diminished memory and dementia, and this evidence was the basis of a Rule 60 motion in the trial court which was pending at the time *Conlon* was settled.

On 22 April 2008, defendant moved for summary judgment in this case. After hearing arguments from both parties, the trial court granted summary judgment to defendant on 31 October 2008 as to all of plaintiffs' claims. Plaintiffs filed a timely notice of appeal on 21 November 2008. On appeal, plaintiffs argue that the trial court erred by entering summary judgment in defendant's favor on their claims for professional negligence, constructive fraud, fraud, and obstruction of justice.

**II. ANALYSIS****A. Standard of Review**

We review orders granting summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009).

The initial burden of showing that no issue exists for trial rests on the moving party. *Spaulding v. Honeywell Int'l, Inc.*, 184 N.C. App. 317, 320, 646 S.E.2d 645, 648, *disc. review denied*, 361 N.C. 696, 654 S.E.2d 482 (2007), *reh'g dismissed, cert. denied*, 362 N.C. 177, 657 S.E.2d 667 (2008). A defendant may be entitled to summary judgment upon: "(1) proving that an essential element of the plaintiff's case is non-existent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense." *Id.* (quoting *Draughon v. Harnett Cty. Bd. of Educ.*, 158 N.C. App. 208, 212, 580 S.E.2d 732, 735 (2003)). If a moving party shows that no genuine issue of material fact exists for trial, the bur-

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den shifts to the nonmovant to adduce specific facts establishing a triable issue. *Jones*, 362 N.C. at 573, 669 S.E.2d at 576.

At the summary judgment hearing in this case, defendant presented extensive evidence that: the July 2002 affidavit did not proximately cause plaintiffs' damages; plaintiffs' claims of professional negligence, fraud, and obstruction of justice are barred by the applicable statutes of limitations; and defendant received no benefit during his alleged wrongful acts, which is an essential element of constructive fraud. Our *de novo* review shows that the facts taken in a light most favorable to plaintiffs fail to establish a triable issue sufficient to overcome these defenses. We conclude summary judgment was properly granted to defendant.

## B. Proximate Cause

[1] An essential element of each of plaintiffs' claims is a showing that defendant proximately caused their damages. *Jay Group, Ltd. v. Glasgow*, 139 N.C. App. 595, 601, 534 S.E.2d 233, 237 (2000) (fraud and constructive fraud require showing of proximate cause); *Rorrer v. Cooke*, 313 N.C. 338, 355, 329 S.E.2d 355, 366 (1985) (professional malpractice claim against attorney requires existence of proximate cause); see *Grant v. High Point Reg'l Health Sys.*, 184 N.C. App. 250, 256, 645 S.E.2d 851, 855 (2007) (defendant's argument that proximate cause was not adequately pled in the plaintiff's complaint was held insufficient to warrant a Rule 12(b)(6) dismissal of the plaintiff's obstruction of justice claim), *disc. review improvidently allowed*, 362 N.C. 502, 666 S.E.2d 757 (2008).

Proximate cause is defined as "a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred[.]" *Hairston v. Alexander Tank & Equipment Co.*, 310 N.C. 227, 233, 311 S.E.2d 559, 565 (1984). Thus, before holding a defendant liable for an injury to a plaintiff, it must be shown that defendant's actions were " 'a substantial factor . . . of the particular injuries for which plaintiff seeks recovery.' " *Brown v. Neal*, 283 N.C. 604, 611, 197 S.E.2d 505, 509 (1973) (quoting *Gillikin v. Burbage*, 263 N.C. 317, 139 S.E.2d 753 (1965)).

Our Court held in *Conlon* that title to the Birdie Lane property did not pass to the decedent, Coleman, by deed, because the March 1995 power of attorney did not include gifting authority. The opinion does not mention defendant's July 2002 affidavit, because its contents are irrelevant to the legal determination to affirm the trial court's order

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voiding the June 1999 deed. This lack of authority is a matter of law and not of fact. Determining title to real estate is evidenced by reference to recorded transactions in the Register of Deeds. Since the property was legally transferred upon Coleman's death to Frances by virtue of operation of law, the conversations between defendant and Frances are not significant. Therefore, plaintiffs cannot show how the affidavit proximately caused any injury. Given this Court's decision in *Conlon*, summary judgment on plaintiffs' claims with respect to the July 2002 affidavit was proper.

**C. Statutes of Limitations**

**[2]** Claims for professional negligence are "deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action[.]" and the statute of repose bars actions accruing four years prior to the filing of a claim. N.C. Gen. Stat. § 1-15(c) (2009). Fraud and obstruction of justice must be brought within three years from the time the cause of action accrues, and an action accrues when a plaintiff becomes aware or reasonably should have become aware of the fraud or harm. N.C. Gen. Stat. § 1-52(9), (16) (2009).

Here, plaintiffs filed their complaint against defendant on 8 July 2005. The last act or omission by defendant alleged in plaintiffs' complaint, outside the July 2002 affidavit, is defendant's preparation of the November 1997 will. Since plaintiffs' claims for professional negligence, fraud, and obstruction of justice expired prior to the filing of their complaint in this action, summary judgment was proper as to these claims. These assignments of error are overruled.

**D. Constructive Fraud**

**[3]** To demonstrate a prima facie claim for constructive fraud, a plaintiff must show: "(1) facts and circumstances creating a relation of trust and confidence; (2) which surrounded the consummation of the transaction in which the defendant is alleged to have taken advantage of the relationship; and (3) the defendant sought to benefit himself in the transaction." *Sullivan v. Mebane Packaging Grp., Inc.*, 158 N.C. App. 19, 32, 581 S.E.2d 452, 462 (2003).

With respect to the third element, this Court has held that "payment of a fee to a defendant for work done by that defendant does not by itself constitute sufficient evidence that the defendant sought his own advantage[.]" *NationsBank of N.C. v. Parker*, 140 N.C. App. 106, 114, 535 S.E.2d 597, 602 (2000); see *Sterner v. Penn*, 159 N.C. App.

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626, 583 S.E.2d 670 (2003) (brokers receiving commissions on sales insufficient benefit to support constructive fraud).

Moreover, “[t]he benefit sought by the defendant must be more than a continued relationship with the plaintiff.” *Sterner*, 159 N.C. App. at 631, 583 S.E.2d at 674; see *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 488 S.E.2d 215 (1997) (a defendant’s continued business transactions with a plaintiff were not a sufficient benefit to the defendant to support a claim of constructive fraud).

Here, plaintiffs argue that “[t]he evidence presented supports [p]laintiffs’ position that [d]efendant has violated his duty to Coleman Self, his estate and heirs all for the betterment of maintaining his continued friendship and legal relationship with Frances Self and Peggy Conlon.” Plaintiffs argue in particular that defendant benefitted by serving the interests of Peggy Conlon and Frances over Coleman’s interests.

In support of this theory, plaintiffs rely exclusively on an unpublished federal district court case, *Schmidt v. Wachovia Bank*, No. 3:08-CV-185, 2008 WL 5396684 (W.D.N.C. Dec. 23, 2008). While federal court cases deciding state law issues may sometimes be persuasive, they are not precedential. *Huggard v. Wake County Hospital System*, 102 N.C. App. 772, 775, 403 S.E.2d 568, 570 (1991), *aff’d*, 330 N.C. 610, 411 S.E.2d 610 (1992). However, even if we were to apply *Schmidt*, a reading of the district court’s opinion shows that it found that the defendant actually acquired a financial benefit from its actions—not merely a benefit of helping a preferred client at the plaintiff’s expense. *Schmidt*, No. 3:08-CV-185, 2008 WL 5396684, at \*2 (“defendant allegedly benefitted *financially* by not hedging [the plaintiff’s] stock”) (emphasis added). Therefore, even if *Schmidt* were persuasive authority for this Court, its conclusion is inapplicable to plaintiffs’ current constructive fraud argument.

Applying plaintiffs’ complaint to the controlling case law collected above, plaintiffs have failed to show that defendant received anything other than attorney fees and perhaps a continued “friendship” with Peggy Conlon and Frances. As this Court has previously held, these benefits are insufficient to support a cause of action for constructive fraud. See *Sterner*, 159 N.C. App. at 631, 583 S.E.2d at 674; *NationsBank*, 140 N.C. App. at 114, 535 S.E.2d at 602.

Moreover, even assuming that Peggy Conlon and Frances were advantaged by defendant’s joint representation of Coleman and Frances, the advantage would stem from the failure of the March 1995

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power of attorney to include a gift provision. This creates two bars to plaintiffs' claim for constructive fraud: (1) the statute of limitations for constructive fraud is ten years, and plaintiffs' complaint was not filed until 8 July 2005; and (2) defendant prepared the March 1995 power of attorney for Frances, and therefore, defendant did not breach a fiduciary duty to Coleman at that time. *Piles v. Allstate Ins. Co.*, 187 N.C. App. 399, 403, 653 S.E.2d 181, 185 (2007) (statute of repose for constructive fraud is ten years), *disc. review denied*, 362 N.C. 361, 663 S.E.2d 316 (2008).

Since plaintiffs have failed to prove the benefit element of constructive fraud, the trial court did not err in granting defendant summary judgment on this claim. This assignment of error is overruled.

**III. CONCLUSION**

Our *de novo* review of the record shows that defendant presented sufficient evidence at trial to show that no genuine issue of material fact exists; and therefore, the trial court properly granted defendant summary judgment on plaintiffs' claims for professional negligence, fraud, constructive fraud, and obstruction of justice. Accordingly, the order of the trial court is

Affirmed.

Judges STEPHENS and BEASLEY concur.

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STATE OF NORTH CAROLINA v. TERRY LEE FORTNEY, DEFENDANT

No. COA09-479

(Filed 5 January 2010)

**1. Evidence— prior felony conviction—rejection of defendant's stipulation—not unfairly prejudicial**

The trial court did not abuse its discretion in a prosecution for possession of a firearm by a felon, carrying a concealed weapon, and narcotics offenses by allowing evidence of defendant's specific prior felony conviction even though he had offered to stipulate that he had a prior felony.

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**2. Evidence— constructive possession—borrowed vehicle— totality of circumstances**

The trial court did not err by failing to dismiss all charges, including possession of a firearm by a felon, possession of a schedule II controlled substance, possession of marijuana, possession of drug paraphernalia, and carrying a concealed weapon, based on alleged insufficient evidence because the totality of the circumstances revealed that a reasonable jury could conclude that defendant constructively possessed the contraband in the carry bag of a borrowed motorcycle.

**3. Sentencing— prior record level—out-of-state offense— failure to show substantial similarity with North Carolina offense**

The trial court's determination that defendant had a prior record level VI with 19 points was remanded for resentencing solely to determine whether defendant had 18 or 19 sentencing points where the trial court failed to determine whether a New York offense was substantially similar to a North Carolina offense.

Appeal by defendant from judgment entered 5 November 2008 by Judge Mark E. Klass in Cabarrus County Superior Court. Heard in the Court of Appeals 14 October 2009.

*Attorney General Roy Cooper, by Assistant Attorney General E. Michael Heavner, for the State.*

*William D. Auman for defendant-appellant.*

HUNTER, Robert C., Judge.

Defendant Terry Lee Fortney appeals from his convictions for possession of a firearm by a felon, possession of a schedule II controlled substance, possession of marijuana, possession of drug paraphernalia, and carrying a concealed weapon. Defendant contends that the trial court erred by admitting evidence of defendant's prior first-degree rape conviction and by failing to dismiss the charges due to insufficient evidence. Defendant additionally argues that the trial court incorrectly calculated his prior record level for sentencing purposes. We conclude that the admission of defendant's prior conviction was not unfairly prejudicial; and, that the trial court properly denied defendant's motion to dismiss. We agree with defendant, however, that the trial court erred in calculating his prior record level. Accordingly, we reverse as to the sentence and remand for proper calculation.

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Facts

The evidence at trial tended to show that in the late evening hours of 22 September 2007, officers with the Cabarrus County Sheriff's Office were conducting a driving-while-impaired checkpoint. Sergeant Dennis McClure observed defendant driving a Harley Davidson motorcycle towards the checkpoint. Defendant almost came to a stop on Highway 49 before turning into Car Connection, a closed business located across the street from the checkpoint. McClure watched as defendant removed his helmet, positioned the helmet over the rear reflector of the motorcycle, thereby obscuring the reflector, and pushed the motorcycle into the lower part of the parking lot.

McClure and other officers located the motorcycle with the helmet still covering the rear taillight, and began searching for defendant, whom McClure had observed having "grey, kind of bushy hair" and wearing a "white or a light-colored T-shirt." Subsequently, officers located defendant crouched behind two parked cars approximately 25 to 30 feet away from the motorcycle.

After determining that defendant had a revoked driver's license, McClure placed defendant under arrest and began to search defendant and the motorcycle. The search of defendant's person revealed only a cell phone. Attached between the handlebars of the motorcycle was a carry bag which contained a .32 caliber Savage Arms handgun, a bag of what appeared to the officers to be marijuana seeds, rolling papers, marijuana, a bag of what appeared to be crystal methamphetamine, and a cell phone charger.

Defendant indicated that the motorcycle belonged to a friend. Defendant denied knowledge of the contents of the carry bag, but acknowledged ownership of the cell phone. When asked whether the cell phone charger in the bag was his, he responded: "I don't know." Officers plugged the charger into the cell phone and determined that they were a match.

Defendant was charged with possession of a firearm by a felon, possession of a schedule II controlled substance, carrying a concealed weapon, possession of marijuana, possession of drug paraphernalia, and driving with a revoked license. At trial, defendant offered to stipulate to having a prior felony. After the State declined to accept the stipulation, the trial court, over defendant's objection, allowed defendant's 1979 judgment for first-degree rape to be admit-

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ted into evidence. The trial court also allowed a court clerk to testify regarding the information contained in the judgment. At the close of the State's evidence, the trial court dismissed the charge of driving with a revoked license. The jury convicted defendant on all remaining charges. Over defendant's objection, he was sentenced as a Level VI offender with 19 points, including five points for out-of-state convictions. Defendant was sentenced to a presumptive-range term of 29 to 35 months imprisonment. Defendant timely appealed to this Court.

## I

[1] Defendant first argues that the trial court erred by allowing evidence of defendant's specific prior felony conviction when he had offered to stipulate that he had a prior felony. Specifically, defendant claims that the testimony of Overcash as to the first-degree rape conviction was inadmissible hearsay. Alternatively, defendant contends that the admission of the prior judgment was unfairly prejudicial to defendant in violation of Rule 403 of the Rules of Evidence.

N.C. Gen. Stat. § 14-415.1(b) (2007) provides in pertinent part:

When a person is charged under this section, records of prior convictions of any offense, whether in the courts of this State, or in the courts of any other state or of the United States, shall be admissible in evidence for the purpose of proving a violation of this section. . . . A judgment of a conviction of the defendant or a plea of guilty by the defendant to such an offense certified to a superior court of this State from the custodian of records of any state or federal court shall be prima facie evidence of the facts so certified.

This statute expressly allows for the admission of certified judgments to prove the existence of a prior felony. When a statute explicitly provides for the introduction of certain evidence, that alone provides a sufficient basis for its admission. *State v. Leach*, 166 N.C. App. 711, 717, 603 S.E.2d 831, 836 (2004). The trial court, therefore, properly admitted defendant's prior conviction pursuant to N.C. Gen. Stat. § 14-415.1(b).

Defendant nonetheless argues that he was unfairly prejudiced by the admission of the evidence of his prior conviction. During the trial, defendant offered to stipulate that he had a prior felony, but the State declined to accept the stipulation, and the trial court, over defendant's objection, allowed the State to present defendant's 1979 judgment for first-degree rape. Defendant contends that the trial

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court should have enforced his offered stipulation and excluded evidence concerning his prior conviction because, although relevant, the probative value of the evidence was substantially outweighed by the danger of unfair prejudice under Rule 403. Whether to exclude evidence under Rule 403 is a matter within the sound discretion of the trial court, *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986), and the court's ruling may be reversed on appeal only upon a showing that it could not have been the result of a reasoned decision, *State v. Thompson*, 314 N.C. 618, 626, 336 S.E.2d 78, 82 (1985).

Generally, the State is not required to accept an evidentiary stipulation, but rather, is entitled to prove all essential elements of its theory of the case. *See State v. Little*, 191 N.C. App. 655, 661, 664 S.E.2d 432, 437 (“[T]he prosecution is entitled to prove its case by evidence of its own choice, or, more exactly, that a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it.” (quoting *Old Chief v. United States*, 519 U.S. 172, 186-87, 136 L. Ed. 2d 574, 591-92 (1997)), *disc. review denied*, 362 N.C. 685, 671 S.E.2d 326 (2008)). Absent a tendered stipulation, judgments of prior felony convictions are admissible for purposes of proving possession of a firearm by a felon under N.C. Gen. Stat. § 14-415.1(b), since there is no other way for the State to prove its case. *State v. Wood*, 185 N.C. App. 227, 231-32, 647 S.E.2d 679, 684 (2007).

Admission of evidence of a prior conviction may nevertheless result in unfair prejudice where the defendant has offered to stipulate to having a prior conviction so long as the name and general nature of the conviction is not disclosed to the jury. *Little*, 191 N.C. App. at 660, 664 S.E.2d at 436. In determining whether unfair prejudice results in this scenario, the test is whether the prior conviction is substantially similar to the current charges, thus exposing the defendant to the danger that the jury might “generaliz[e] a defendant's earlier bad act into bad character and tak[e] that as raising the odds that he did the later bad act now charged . . .” *Old Chief*, 519 U.S. at 181, 136 L. Ed. 2d at 588.

In *State v. Jackson*, 139 N.C. App. 721, 732, 535 S.E.2d 48, 55 (2000), *rev'd in part on other grounds*, 353 N.C. 495, 546 S.E.2d 570 (2001), this Court held that the admission of the defendant's prior voluntary manslaughter conviction was not unfairly prejudicial because it was substantially dissimilar to the defendant's then-current charges of carrying a concealed weapon, possession of a firearm by a felon, and resisting a public officer. Similarly, in *Little*, 191 N.C. App.

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at 662, 664 S.E.2d at 437, this Court held that the trial court had not abused its discretion in admitting the defendant's prior conviction for involuntary manslaughter during the defendant's trial for attempted first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, possession of a firearm by a felon, and discharging a firearm into occupied property. Because involuntary manslaughter is not a crime involving malice or intent to kill, the Court concluded that it was not substantially similar to the charges for which the defendant was being tried, and, therefore, admission of the evidence of the prior conviction was not unfairly prejudicial. *Id.*

*Jackson* and *Little* are controlling here because, as in those cases, defendant's prior conviction for rape is not substantially similar to the offenses for which he was tried: drug possession, possession of a firearm by a felon, and carrying a concealed weapon. Consequently, we are unable to conclude that admission of defendant's prior felony conviction in lieu of the offered stipulation was an abuse of discretion. Therefore, defendant's first assignment of error is overruled.

## II

[2] Defendant next contends that the trial court erred by failing to dismiss all the charges against him for insufficient evidence. A motion to dismiss due to insufficiency of the evidence is properly denied if the State has presented substantial evidence of each essential element of the offense charged and that the defendant is the perpetrator. *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000). Substantial evidence is that which a reasonable fact finder might find sufficient to support a conclusion. *State v. McLaurin*, 320 N.C. 143, 146, 357 S.E.2d 636, 638 (1987). The court must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. *Fritsch*, 351 N.C. at 378-79, 526 S.E.2d at 455.

Defendant maintains that the State failed to present substantial evidence that defendant either actually or constructively possessed any of the contraband found on the motorcycle. A person has constructive possession of an item when he does not have actual physical possession, but is aware of its presence and has both the power and intent to control its disposition or use. *State v. James*, 81 N.C. App. 91, 93, 344 S.E.2d 77, 79 (1986). When a defendant does not have exclusive possession of the location where the drugs are found, the State is required to show "other incriminating circumstances" in

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order to establish constructive possession. *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 270 (2001). North Carolina courts have cited a variety of factors that may be used in conjunction with the defendant's presence near the seized contraband to support a finding of constructive possession including: other personal items of the defendant near the contraband, *State v. Autry*, 101 N.C. App. 245, 252, 399 S.E.2d 357, 362 (1991); defendant had some control of the premises where the contraband was found, *State v. Turner*, 168 N.C. App. 152, 156, 607 S.E.2d 19, 20-23 (2005); and defendant's nervous or suspicious behavior, *State v. Carr*, 122 N.C. App. 369, 373, 470 S.E.2d 70, 73 (1996).

In the instant case, the State argues that defendant had control over the motorcycle and carry bag even though he was not the owner of the motorcycle. This Court has previously found that the borrower of a vehicle has the same ability to control its contents as does the owner. *State v. Glaze*, 24 N.C. App. 60, 64, 210 S.E.2d 124, 127 (1974). Thus, "where contraband material is under the control of an accused, even though the accused is the borrower of a vehicle, this fact is sufficient to give rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury." *Id.*

Sufficient incriminating circumstances are present in this case to warrant a finding of constructive possession. When they searched the motorcycle driven by defendant, police found in the carry bag, along with the gun, drugs, and drug paraphernalia, a cell phone charger that matched defendant's cell phone. From this evidence, a reasonable jury could conclude that defendant was aware of the contents of the carry bag and had the power and intent to control their disposition. *See Autry*, 101 N.C. App. at 252, 399 S.E.2d at 362 (finding sufficient evidence of constructive possession where defendant was found a few feet away from kitchen table where police found jacket, cash, bags of cocaine, and pistol and defendant claimed ownership of jacket and cash).

Defendant's behavior is likewise incriminating. Conduct that this Court has deemed suspicious include attempting to flee from law enforcement, *State v. Harrison*, 93 N.C. App. 496, 498, 378 S.E.2d 190, 192 (1989); sweating profusely, *State v. Tisdale*, 153 N.C. App. 294, 296, 569 S.E.2d 680, 681 (2002); and attempting to hide one's true identity, *Carr*, 122 N.C. App. at 373, 470 S.E.2d at 73. The record indicates that defendant evaded a DWI checkpoint by turning into a business that had closed for the day, obscured the rear reflector, and pushed the motorcycle into the lower portion of the parking lot.

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When police searched the area, defendant was found crouched behind two parked cars a few feet away from the motorcycle. Defendant was evasive when asked about who owned the motorcycle and the license plate was found to be fictitious. Based on the totality of the circumstances, a reasonable jury could conclude that defendant constructively possessed the contraband in the carry bag. Therefore, the trial court did not err in denying defendant's motion to dismiss for insufficient evidence.

## III

[3] Defendant's final argument on appeal is that the trial court erred in finding defendant to have a prior record level VI with 19 points. Specifically, defendant alleges that the State failed to produce sufficient evidence to show defendant had been convicted of certain out-of-state convictions. Alternatively, defendant claims that even if those convictions were shown to be his, the trial court failed to examine the out-of-state statutes to determine whether they were based on a "similar statute" for purposes of determining their proper conviction points.

The standard of review relating to the sentence imposed by the trial court is whether the sentence is supported by evidence introduced at the trial and sentencing hearing. *State v. Chivers*, 180 N.C. App. 275, 278, 636 S.E.2d 590, 593 (2006). However, "the question of whether a conviction under an out-of-state statute is substantially similar to an offense under North Carolina statutes is a question of law" requiring *de novo* review on appeal. *State v. Hanton*, 175 N.C. App. 250, 255, 623 S.E.2d 600, 604 (2006).

"The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction." N.C. Gen. Stat. § 15A-1340.14(f) (2007). The statute further provides that a prior conviction may be proven by (1) stipulation of the parties, (2) an original or copy of the court record of the prior conviction, (3) copy of records maintained by the Division of Criminal Information, Division of Motor Vehicles, or Administrative Office of the Courts, or (4) any other method found by the court to be reliable. N.C. Gen. Stat. § 15A-1340.14(f).

The record indicates that the State tendered to the trial court a computerized criminal history printout from the FBI's National Crime Information Center ("NCIC") database. This printout, reporting convictions for possession of a firearm by a felon in Virginia and

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“Assault-3rd” in New York, shows defendant’s name, date of birth, sex, race, and height. Since the NCIC printout included the offender’s weight, eye color, hair color, scars, and tattoos, the trial court had the opportunity to compare the characteristics to those of defendant.

No North Carolina court has specifically addressed whether an NCIC printout is an appropriate method of proving a defendant’s prior conviction history. Although NCIC reports are not among the enumerated items contained in N.C. Gen. Stat. § 15A-1340.14(f), the statute provides for proof by “any other method” deemed reliable. We conclude that the NCIC report tendered in this case contained sufficient identifying information to prove by a preponderance of the evidence that defendant was the subject of the report and the perpetrator of the offenses specified in the report.

Additionally, the State tendered to the trial court a document obtained from the commonwealth attorney’s office in Virginia detailing the conviction for possession of a firearm by a felon. This document, entitled “Virginia Courts Case Information,” although missing defendant’s year of birth and social security number, comports in all other respects with the NCIC printout. Therefore, based on all the information presented, there is sufficient evidence to support the trial court’s finding that defendant had been convicted of these out-of-state felonies.

N.C. Gen. Stat. § 15A-1340.14(e) provides that:

Except as otherwise provided in this subsection, a conviction occurring in a jurisdiction other than North Carolina is classified as a Class I felony if the jurisdiction in which the offense occurred classifies the offense as a felony, or is classified as a Class 3 misdemeanor if the jurisdiction in which the offense occurred classifies the offense as a misdemeanor. . . . If the State proves by the preponderance of the evidence that an offense classified as either a misdemeanor or a felony in the other jurisdiction is substantially similar to an offense in North Carolina that is classified as a Class I felony or higher, the conviction is treated as that class of felony for assigning prior record level points. If the State proves by the preponderance of the evidence that an offense classified as a misdemeanor in the other jurisdiction is substantially similar to an offense classified as a Class A1 or Class 1 misdemeanor in North Carolina, the conviction is treated as a Class A1 or Class 1 misdemeanor for assigning prior record level points.

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Determination of whether the out-of-state conviction is substantially similar to a North Carolina offense is a question of law involving comparison of the elements of the out-of-state offense to those of the North Carolina offense. *Hanton*, 175 N.C. App. at 255, 623 S.E.2d at 604.

Although the record does not reveal the trial court's review or analysis of the Virginia statute, the judge did technically make "the finding of the statute being similar in Virginia and North Carolina." Defendant's Virginia conviction was for "[p]ossession . . . of firearms . . . by convicted felons," which prohibits:

any person who has been convicted of a felony under the laws of this Commonwealth, or any other state, the District of Columbia, the United States or any territory thereof, to knowingly and intentionally possess or transport any firearm . . . .

Va. Code Ann. § 18.2-308.2(A) (1992). A violation of this statute is punishable as a Class 6 felony. Va. Code Ann. § 18.2-308.2(A). The corresponding North Carolina statute makes it unlawful for "any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm . . ." N.C. Gen. Stat. § 14-415.1 (2007). This offense is defined as a Class G felony carrying four points for sentencing. We find these statutory offenses to be "substantially similar" as required by N.C. Gen. Stat. § 15A-1340.14(e). The trial court, therefore, did not err in treating defendant's Virginia conviction as a Class G felony for purposes of calculating defendant's prior record level.

With respect to defendant's New York assault conviction, however, the State concedes and we so hold that the trial court failed to determine whether it is substantially similar to a North Carolina offense and that the case should be remanded for the trial court to make such a determination. Without the one point assigned to this conviction, defendant would have a prior record level of V rather than VI; it is thus necessary for the trial court to determine whether the New York conviction is substantially similar to a North Carolina offense. Consequently, we remand for resentencing solely to determine whether defendant has 18 or 19 sentencing points.

No error at trial; reversed and remanded for re-sentencing.

Judges CALABRIA and GEER concur.

**LAND v. LAND**

[201 N.C. App. 672 (2010)]

CLEO EDWARD LAND, SR., AND RAYMOND ALAN LAND, ON BEHALF AND DERIVATIVELY ON BEHALF OF EDDIE LAND MASONRY CONTRACTOR, INC., PLAINTIFFS v. CLEO EDWARD LAND, JR., NANCY K. LAND, AND EDDIE LAND MASONRY CONTRACTOR, INC., DEFENDANTS

No. COA09-464

(Filed 5 January 2010)

**1. Appeal and Error— interlocutory orders—absence of substantial right—no automatic appeal**

There is no automatic right of appeal under either N.C.G.S. §§ 1-277 or 7A-27(d) in the absence of a showing of a substantial right affected by the trial court's denial of defendant's motion for a new trial. In this case, the denial of defendants' motion for a new trial was only as to the liability phase of a bifurcated trial.

**2. Appeal and Error— interlocutory orders—substantial right—second jury on damages**

Defendants' appeal was from an interlocutory order where they had moved for a bifurcated trial on damages and then argued that they had a substantial right to have the same jury decide liability, compensatory damages, and punitive damages. While there will be some repetition of evidence, the second trial does not involve the same issues and there is no possibility of an inconsistent verdict.

**3. Trials— motion to bifurcate—statute under which motion made**

When a motion to bifurcate a trial is made pursuant to N.C.G.S. § 1D-30, the trial court is obliged to follow the procedures set forth in that statute; however, the court is not so bound where the motion is made under the more general provision of N.C.G.S. § 1A-1, Rule 42(b). The trial court here did not abuse its discretion by releasing the jury at the conclusion of the liability phase of the trial, given the extensive discovery on damages that had been suspended at defendant's request until after liability was determined.

Appeal by defendants from judgment 19 December 2008 by Judge Ben F. Tennille in the North Carolina Business Court. Heard in the Court of Appeals 14 October 2009.

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[201 N.C. App. 672 (2010)]

*Brooks Pierce McLendon Humphrey & Leonard, LLP, by Reid L. Phillips, Jennifer T. Harrod, and John A. Duberstein, for plaintiff-appellees.*

*Smith Moore Leatherwood LLP, by James G. Exum, Jr., Jon Berkelhammer, Allison O. Van Laningham, and L. Cooper Harrell, for defendant-appellants.*

STEELMAN, Judge.

Where defendants' liability for compensatory and punitive damages has been established by jury verdicts, and the only unresolved issue before the trial court is the amount of damages to be awarded, this appeal is interlocutory, does not affect a substantial right, and must be dismissed.

### I. Factual and Procedural Background

From 1950 until 1982, Cleo Edward Land, Sr. (Cleo) operated a masonry company named C.E. Land, Inc. at which both of his sons, Cleo Edward Land, Jr. (Eddie) and Raymond Alan Land (Alan), were employed for several years. In 1974, Eddie left the family business and formed his own separate masonry company, Eddie Land Masonry Contractor, Inc. In 1982, Cleo decided he would soon retire, but was reluctant to turn the entire business over to his youngest son, Alan, based upon his youth and inexperience. Cleo approached Eddie with the concept of combining the assets of C.E. Land, Inc. and Eddie Land Masonry Contractor, Inc. into a single company in which Eddie and Alan would be equal partners. Eddie allegedly agreed to this arrangement, and Cleo gave his sons control over C.E. Land, Inc.'s equipment, tools, materials, supplies, employees, and contracts. The combined company operated under the name of Eddie Land Masonry Contractor, Inc. Eddie was the President of the company, and Alan was Vice-President. In 2005, Alan made repeated requests to Eddie for information about the company's financial condition and the value of his interest in the business. Alan became concerned when he learned that Eddie and his wife, Nancy K. Land (Nancy), were using assets of the company to purchase real property. Alan made written requests for financial information on 29 July and 20 October 2005. On 3 November 2005, Eddie's attorney sent a letter to Alan stating that Cleo had given the assets of C.E. Land, Inc. to Eddie in 1982, and that Alan had no ownership rights in the company and was merely an employee.

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On 18 November 2005, Cleo and Alan (collectively, plaintiffs), filed a complaint against Eddie, Nancy, and Eddie Masonry Contractor, Inc., (collectively, defendants) alleging sixteen causes of action, including *inter alia*, breach of contract, fraud, constructive fraud, breach of oral partnership agreement, conversion, breach of fiduciary duty, aiding and abetting, unfair and deceptive trade practices, unjust enrichment, and punitive damages. On 26 May 2006, defendants filed an answer, which denied the material allegations in plaintiffs' complaint, and asserted counterclaims for the repayment of a company loan and the non-reimbursed expenses and benefits obtained from the company by Alan.

On 7 June 2006, defendants filed a motion requesting that the trial court bifurcate the liability and damages portions of the case. All parties moved for summary judgment. On 16 June 2008, the trial court entered an order denying all of the parties' motions for summary judgment and granting defendants' motion for a bifurcated trial, over plaintiffs' objection. The jury trial commenced on 16 September 2008. The trial court submitted eighteen issues to the jury arising out of plaintiffs' claims and defendants' counterclaims. These issues were answered in favor of plaintiffs, establishing defendants' liability for compensatory and punitive damages, and ruling against defendants on their counterclaims. Upon the return of the verdicts, the trial court discharged the jury without objection from any party and entered an "Interlocutory Judgment on Liability." Defendants filed a motion for judgment notwithstanding the verdict and for a new trial pursuant to Rules 50 and 59 of the Rules of Civil Procedure. These motions were denied. On 30 December 2008, defendants filed a notice of appeal to this Court. On 24 February 2009, the trial court entered an order ruling that because defendants' appeal was interlocutory, the court retained jurisdiction over the case, and that the parties were to proceed with discovery and the damages phase of the case.

**II. Interlocutory Nature of Appeal**

Appeals from the trial division in civil cases are permitted only by statute. *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Id.* Because the trial court's order did not dispose of the entire case and left the matter of plaintiffs' damages unresolved, it is an interlocutory order. There is

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no right of immediate appeal from an interlocutory order except in two instances: “(1) the order is final as to some claims or parties, and the trial court certifies pursuant to N.C.G.S. § 1A-1, Rule 54(b) that there is no just reason to delay the appeal, or (2) the order deprives the appellant of a substantial right that would be lost unless immediately reviewed.” *Currin & Currin Constr., Inc. v. Lingerfelt*, 158 N.C. App. 711, 713, 582 S.E.2d 321, 323 (2003); *see also* N.C. Gen. Stat. § 1-277(a) (2007). “The reason for these rules is to prevent fragmentary, premature and unnecessary appeals by permitting the trial divisions to have done with a case fully and finally before it is presented to the appellate division.” *Waters v. Personnel, Inc.*, 294 N.C. 200, 207, 240 S.E.2d 338, 343 (1978).

There is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders. The rules regulating appeals from the Superior Court to the Supreme Court are designed to forestall the useless delay inseparable from unlimited fragmentary appeals, and to enable courts to perform their real function, *i.e.*, to administer “right and justice . . . without sale, denial, or delay.”

*Veazey*, 231 N.C. at 363-64, 57 S.E.2d at 382 (quoting N.C. Const., Art. I, Sec. 35).

In the instant case, the trial court did not certify its Interlocutory Judgment on Liability order as immediately appealable pursuant to Rule 54(b). Therefore, the burden is on defendants to establish that a substantial right will be lost if the trial court’s order is not immediately reviewed by this Court. *Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 142, 526 S.E.2d 666, 670 (2000) (citation omitted).

### III. Appealability of Order Granting or Denying a New Trial

**[1]** Defendants first contend that N.C. Gen. Stat. § 7A-27(d)(4) authorizes an appeal of any interlocutory order granting or refusing a new trial, without any showing that a substantial right was affected. We disagree.

N.C. Gen. Stat. § 1-277 provides:

(a) An appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, whether made in or out of session, which affects a substantial right claimed in any action or

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proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial.

N.C. Gen. Stat. § 1-277(a) (2007).

N.C. Gen. Stat. § 7A-27(d) provides:

(d) From any interlocutory order or judgment of a superior court or district court in a civil action or proceeding which

(1) Affects a substantial right, or

(2) In effect determines the action and prevents a judgment from which appeal might be taken, or

(3) Discontinues the action, or

(4) Grants or refuses a new trial, appeal lies of right directly to the Court of Appeals.

N.C. Gen. Stat. § 7A-27(d) (2007).

We note that the same four items enumerated in N.C. Gen. Stat. § 7A-27(d) are also contained in N.C. Gen. Stat. § 1-277(a). Therefore, we look for guidance to cases decided under either statute in our analysis.

In *Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 251 S.E.2d 443 (1979), the trial court entered summary judgment in favor of the plaintiff on the issue of liability, but determined that damages, attorney's fees, and costs were to be decided at a later time. *Id.* at 488, 251 S.E.2d at 445. The trial court then proceeded to certify its ruling for immediate appeal. *Id.* Our Supreme Court held that "a partial summary judgment entered for plaintiff on the issue of liability only leaving for further determination at trial the issue of damages" is not immediately appealable. *Id.* at 492, 251 S.E.2d at 448.

Several months later, this Court applied the holding in *Industries, Inc.* to a case where the trial court granted a new trial only as to the issue of damages in *Insurance Co. v. Dickens*, 41 N.C. App. 184, 254 S.E.2d 197 (1979). The jury in *Insurance Co.* returned a verdict in favor of the plaintiffs. *Id.* at 185, 254 S.E.2d at 198. The trial court accepted the verdict as to liability, but set it aside as to damages. *Id.* This Court held:

The defendants here, as the defendant in *Industries, Inc.*, can preserve the right to have appellate review of all trial court pro-

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ceedings by duly entered exceptions on appeal from the final judgment. All reasons advanced by our Supreme Court in *Industries, Inc.* against permitting fragmentary, premature, and unnecessary appeals, apply with equal force in the present case.

*Id.* at 186, 254 S.E.2d at 198.

This Court went on to specifically hold that the language contained in N.C. Gen. Stat. § 1-277(a) pertaining to the immediate appealability of an order granting or denying a new trial, “does not apply to an order which grants only a partial new trial.” *Id.* at 187, 254 S.E.2d at 198. In the instant case, the denial of defendants’ motion for a new trial was only as to the liability phase of the trial. It therefore falls under the rationale of *Industries, Inc.* and *Insurance Co.* There is no automatic right of appeal under either N.C. Gen. Stat. §§ 1-277 or 7A-27(d) in the absence of a showing of a substantial right from the trial court’s denial of defendants’ motion for a new trial.

This argument is without merit.

IV. Appealability of Order Based Upon a Substantial Right

[2] Defendants next contend that “certain issues raised in this appeal impact Defendants’ substantial rights” and that their appeal of an interlocutory order should be heard pursuant to N.C. Gen. Stat. §§ 1-277 or 7A-27(d). We disagree.

Defendants assert that they have a substantial right to have the same jury decide liability, compensatory, and punitive damages. In support of their argument, defendants cite *Industries, Inc., supra*, for the proposition that “it is impermissible for one jury to decide liability and then award compensatory damages with a second jury considering liability for the amount of punitive damages.” As recited above, *Industries, Inc.* explicitly held that the order of the trial court granting partial summary judgment as to only liability was not immediately appealable. *Industries, Inc.*, 296 N.C. at 492, 251 S.E.2d 448. Further, the specific language from *Industries, Inc.* cited by defendants was from the Supreme Court’s discussion of its prior opinion in *Oestreicher v. Stores*, 290 N.C. 118, 225 S.E.2d 797 (1976), and was not part of its holding in that case. See *Industries, Inc.*, 296 N.C. at 493, 251 S.E.2d at 448. In the case of *Green v. Duke Power Co.*, 305 N.C. 603, 290 S.E.2d 593 (1982), the Supreme Court refined its holding in *Oestreicher*, stating “[t]he avoidance of one trial is not ordinarily a substantial right.” *Id.* at 608, 290 S.E.2d at 596 (citing *Bailey v. Gooding*, 301 N.C. 205, 210, 270 S.E.2d 431, 434 (1980);

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*Industries, Inc.*, 296 N.C. at 492, 251 S.E.2d at 447-48; *Waters*, 294 N.C. at 208, 240 S.E.2d at 344). The Supreme Court went on to state that “[o]rdinarily the possibility of undergoing a second trial affects a substantial right only when the same issues are present in both trials, creating the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue.” *Id.*

In the instant case, the trial court, upon the motion of defendants, and over the objection of plaintiffs, bifurcated the liability issues from the damages issues in this case pursuant to Rule 42(b) of the Rules of Civil Procedure. The issues decided at the first trial are thus separate and distinct from those to be decided at the second trial, and there is no possibility of a second jury rendering a verdict inconsistent with the verdict of the first jury. The only issues left to be decided are the amounts of compensatory and punitive damages. While we acknowledge that there will, of necessity, be some repetition of evidence at the second trial to orient the second jury as to the nature of plaintiffs’ claims for compensatory and punitive damages, this does not mean that the same issues will be decided at the second trial.

This argument is without merit.

V. Interplay of N.C. Gen. Stat. § 1D-30 and Rule 42 of the Rules of Civil Procedure

**[3]** Finally, defendants contend that the trial court failed to comply with the provisions of N.C. Gen. Stat. § 1D-30, and that this error warrants immediate review by this Court. N.C. Gen. Stat. § 1D-30 (2007) provides:

Upon the motion of a defendant, the issues of liability for compensatory damages and the amount of compensatory damages, if any, shall be tried separately from the issues of liability for punitive damages and the amount of punitive damages, if any. Evidence relating solely to punitive damages shall not be admissible until the trier of fact has determined that the defendant is liable for compensatory damages and has determined the amount of compensatory damages. The same trier of fact that tried the issues relating to compensatory damages shall try the issues relating to punitive damages.

Under the provisions of Chapter 1D of the General Statutes, the general rule is that the compensatory and punitive damages claims are to

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be tried at the same time, before the same jury. However, N.C. Gen. Stat. § 1D-30 sets forth a specific procedure for bifurcating the compensatory damages phase of the trial from the punitive damages phase of the trial. Under that statute, liability for compensatory damages must first be determined before evidence relating solely to punitive damages can be presented to the jury. This provision is only applicable if the defendant(s) make a motion for bifurcation pursuant to this statute. *Ward v. Beaton*, 141 N.C. App. 44, 52, 539 S.E.2d 30, 36 (2000), *cert. denied*, 353 N.C. 398, 547 S.E.2d 431 (2001).

In the instant case, defendants did not make a motion to bifurcate pursuant to N.C. Gen. Stat. § 1D-30. Rather, their motion was styled “Motion to Bifurcate and Limit Discovery” and was specifically made pursuant to Rule 42(b) of the Rules of Civil Procedure. Defendants’ motion, in part, stated:

To continue to engage in the detailed discovery requested by the Plaintiffs at this point is simply not productive relative to the time and expense it will require for both parties. Further, given . . . the defenses which have been raised thereto, it would serve the ends of justice to bifurcate the liability and damage portions of this case and permit the parties to move forward with discovery limited to liability, conduct a trial with respect to liability and if the jury were to determine that there is no liability, then both parties (and non parties) can avoid substantial time and expense.

In its order of 16 June 2008, the trial court bifurcated the liability issues from the damages issues, citing that the damages discovery would be “enormously expensive,” and that it was probable that “a special master will have to be appointed to conduct an accounting and, perhaps, liquidate the assets.” Thus, the trial court’s ruling clearly did not contemplate that the same jury would hear the liability and damages phases of the trial, due to the extensive nature of the damages discovery that would be required.

Defendants essentially argue that the trial court was required to follow the procedures set forth under N.C. Gen. Stat. § 1D-30, even though their motion to bifurcate was not made pursuant to that statute. We hold that when a motion to bifurcate is pursuant to N.C. Gen. Stat. § 1D-30, then the trial court is obliged to follow the procedures set forth in that statute. However, where the motion to bifurcate is made under the more general provision of Rule 42(b) of the Rules of Civil Procedure, the trial court is not so bound. Decisions of

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the trial court to bifurcate trial proceedings are reviewed by the appellate courts under an abuse of discretion standard. *Kearns v. Horsley*, 144 N.C. App. 200, 208, 552 S.E.2d 1, 7 (2001). We discern no abuse of discretion by the trial judge.

Further, the import of defendants' argument is that they have a substantial right to have the same jury decide liability and the amount of punitive damages. However, this position is directly contrary to the position they took before the trial court in their motion to bifurcate. Their argument before the trial court was that the damages discovery would be so extensive and so expensive that it should not be conducted until liability was established. At their request, the trial court not only bifurcated the trial as to liability and damages, but also suspended discovery as to damages until liability was determined. Given the extensive nature of the damages discovery, yet to be conducted, the trial court did not err in releasing the jury at the conclusion of the liability phase of the trial. This was done without the objection from defendants.

This argument is without merit.

VI. Conclusion

We hold that the denial of defendants' motion for a new trial as to the liability phase of the trial is a non-appealable, interlocutory order. Defendants' appeal is dismissed. We further deny defendants' petition for writ of *certiorari* made pursuant to Rule 21 of the Rules of Appellate Procedure. Defendants' assignments of error as to the liability portion of the trial can be reviewed once a final judgment is entered by the trial court in this matter.

DISMISSED.

Judges ELMORE and HUNTER, JR., Robert N. concur.

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[201 N.C. App. 681 (2010)]

STATE OF NORTH CAROLINA v. EDWARD WALTER SMITH, DEFENDANT

No. COA09-235

(Filed 5 January 2010)

**1. Evidence— officer’s report—waiver of objection—defendant requested second reading of report**

Defendant lost the benefit of his objection to a detective reading to the jury a report of her 9 December 2005 interview with the minor victim in a multiple statutory rape, multiple statutory sex offense, and sex offense in a parental role case based on defense counsel’s request of a second reading of the report.

**2. Evidence— report—testimony about sexual conduct—failure to provide limiting instruction—plain error analysis**

Even assuming *arguendo* that it was error for the trial court to fail to give a limiting instruction regarding the minor victim’s testimony regarding sexual conduct in Florida, there was no plain error given the overwhelming evidence of defendant’s guilt of each offense charged including defendant’s own admissions of the sexual contact and the fact he fathered the minor victim’s child and a second baby that was aborted.

**3. Sexual Offenders— lifetime satellite-based monitoring—failure to order risk assessment and follow statutory procedures**

The trial court erred by ordering defendant to enroll in lifetime satellite-based monitoring (SBM) without ordering a risk assessment and following the other procedures required by N.C.G.S. § 14-208.40A, and the case is remanded for a new SBM hearing.

Appeal by defendant from judgments entered on or about 10 June 2008 by Judge J. Marlene Hyatt in Superior Court, Transylvania County. Heard in the Court of Appeals 2 September 2009.

*Attorney General Roy A. Cooper, III, by Assistant Attorney General Catherine M. (Katie) Kayser, for the State.*

*Brian Michael Aus, for defendant-appellant.*

STROUD, Judge.

Edward Walter Smith (“defendant”) appeals from his convictions for eight counts of statutory rape, six counts of statutory sex offense,

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two counts of sex offense in a parental role, and order to enroll in lifetime satellite-based monitoring upon completion of his sentence. Defendant presents three issues for this Court's review: whether the trial court erred by (1) allowing Detective Smith's report to be read to the jury; (2) not providing a limiting instruction regarding testimony about prior sexual conduct between the victim and defendant; and (3) ordering defendant to enroll in lifetime satellite-based monitoring. For the following reasons, we conclude that the defendant failed to preserve his objection to the reading of Detective Smith's report to the jury, and the trial court did not err by not giving a limiting instruction, but we reverse the trial court's lifetime satellite-based monitoring order and remand for further proceedings.

**I. Background**

The State's evidence tended to show that the alleged victim in this case, Mary<sup>1</sup> was born on 10 August 1985 and is defendant's adopted daughter. Mary went to live with defendant at his home in Florida when she was eight years old, and she was adopted by defendant when she was eleven years old. Mary testified that defendant's first sexual contact with her happened when she was on the couch watching cartoons and defendant came to the living room, pulled her underwear to the side, and performed oral sex on her. She was eleven or twelve years old at the time. About a year later, defendant began having sexual intercourse with Mary. Mary became pregnant when she was fourteen years old and defendant was around fifty or fifty-one years old. When Mary told defendant about the pregnancy, he told her that she was going to have to make up a story about the identity of the father. Mary told her step-mother that the father was "somebody else[.]" but Mary stated that "[t]he father wasn't somebody else, it was my adopted father." Defendant's sexual contact with Mary did not stop after Mary became pregnant. After Mary talked to police and her school principal in Florida about her pregnancy, defendant moved the family to Black Forest Campground in Transylvania County, North Carolina, around March of 2000. Mary was still pregnant and fourteen years old when the family moved to North Carolina. The family lived in an Airstream trailer during their time at Black Forest Campground. Defendant had Mary perform oral sex on him and he continued to have intercourse with Mary, throughout her whole pregnancy, whenever her adopted mother went to work. Defendant told Mary if she ever told her adoptive mother about defendant's actions, "it would

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1. We will refer to the victim by the pseudonym Mary to protect the victim's identity and for ease of reading.

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break her heart” and “would break up the family” and “they would take [Mary’s] daughter away from [her].” Mary gave birth during the summer of 2000, but the sexual contact with defendant continued several times a week. Defendant moved the family from Black Forest Campground to a house in Mel Glen in the Pisgah Forest. Defendant threatened to hurt Mary’s daughter in some way if Mary did not have sex with defendant and Mary felt that defendant was going to “get at [her] somehow if [she] didn’t give in.” The sexual contact continued through 2000 and 2001, until defendant got Mary pregnant again at age sixteen. Defendant told her that she would have to get an abortion because Mary was not dating and “there was nobody to pin it on.” Mary stated that defendant “had already decided for me that I was going to have [an abortion], and there was no other way out.” Defendant drove Mary to Asheville for the abortion. After the abortion, Defendant continued to have oral sex and intercourse with Mary several times a week. When Mary was twenty years old, she decided to leave defendant’s home because she “wanted it to stop and . . . wanted to protect [her] daughter.” Mary told her priest what had happened and went to Safe House, a center for physically, emotionally or sexually abused women. Mary also spoke with T.C. Townsend, a volunteer at Safe House. Mary took out a Chapter 50B domestic violence protective order against defendant in Transylvania County. Defendant testified at the domestic violence hearing. An audio recording of his testimony at that hearing was admitted into evidence and played for the jury.

Mary also spoke with Detective Rita Smith of the Transylvania County Sheriff’s Department on 9 December 2005 and told Detective Smith about the sexual activity between her and defendant. As a result of this conversation, Detective Smith prepared a report, which is the subject of defendant’s first argument on appeal and will be discussed in more detail below. After speaking with Mary, Detective Smith spoke with defendant for approximately an hour on 27 December 2005 at the Transylvania County Sheriff’s Department. Defendant was told that he was not under arrest and was free to leave at any time. Defendant told Detective Smith that sexual activity began between himself and Mary when she was thirteen years old and continued until around 8 December 2005. Defendant stated that the sexual activity began when defendant and Mary were at his brother’s house in Florida and Mary began wrestling with him. Defendant stated that Mary began “humping” on him; defendant stated that their clothes were on. Defendant then stated that Mary “French kissed” him and he said “he was done for.” Defendant claimed that after he

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began having sex with Mary, she “wanted it all the time.” Defendant told Detective Smith that Mary was pregnant at 14 years old; the family moved to Black Forest Campground and then Mary and defendant’s child was born at the Transylvania Community Hospital; he could not remember Mary and him having sex while Mary was pregnant, but he was sure they did; the sex continued after Mary and defendant’s child was born; Mary was pregnant again at 16 years old but Mary had an abortion in Asheville; Mary was the one who wanted the abortion, while he did not want the abortion; he knew that the unborn child was a little boy; and the family was living in Mel Glenn when the abortion happened. Defendant told Detective Smith that Mary’s daughter was his biological child and when Mary became pregnant again at age sixteen that he was sure the baby was also his. Defendant did not present any evidence at trial.

On 30 December 2005, warrants for defendant’s arrest were issued charging him with three counts of statutory rape and two counts of sex offense in a parental role. On 11 December 2006, defendant was indicted on four counts of statutory rape and two counts of sex offense in a parental role. On 28 April 2008, defendant was indicted on six additional counts of statutory sex offense and four additional counts of statutory rape. Defendant was tried during the 9 June 2008 Session of Criminal Session of Superior Court, Transylvania County before the Honorable J. Marlene Hyatt, and a jury found him guilty of all charges. On 10 June 2008, defendant was sentenced to eight active prison terms for his convictions, to run consecutively, for a total of 1488 to 1858 months of imprisonment. The trial court also ordered defendant to enroll in lifetime satellite-based monitoring upon completion of his sentence. Defendant gave notice of appeal on 20 June 2008.

**II. Detective Smith’s Report**

**[1]** Defendant first contends that the trial court erred by allowing Detective Smith to read to the jury the report of her 9 December 2005 interview with Mary, when the report could properly be used only to refresh Detective Smith’s recollection. Detective Smith took notes from this interview and typed up the report as part of the investigation. Detective Smith had retired by the time defendant was tried in 2008 and indicated to the prosecutor that reading the report would refresh her recollection in the following exchange:

[The State]: And can you tell us what she told you?

[Detective Smith]: I can. May I read this?

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[The State]: If it would refresh your recollection.

[Detective Smith]: It would.

[Defense Counsel]: I'm going to object to her reading it. If it will refresh her recollection to testify, but I would object to her reading the document.

[The Court]: Overruled.

[The State]: Go ahead.

Detective Smith was then allowed to read to the jury most of the report from her 9 December 2005 interview with Mary. However, on cross-examination, defense counsel asked Detective Smith to read the same report to the jury in the following exchange:

[Defense Counsel]: And then you also interviewed [Mary] on December 9th; is that right?

[Detective Smith]: Yes.

[Defense Counsel]: And in that interview of December 9th did you make notes like you did on Mr. Smith's interview?

[Detective Smith]: Yes.

[Defense Counsel]: And did you transcribe those onto any documents?

[Detective Smith]: Yes.

[Defense Counsel]: Do you have that with you?

[Detective Smith]: I do.

[Defense Counsel]: Could you read that to the jury, please?

Detective Smith again read the same report from her 9 December 2005 interview with Mary. As defense counsel had requested Detective Smith to read this report again, defense counsel did not object to this second reading of the report. "Where evidence is admitted over objection, and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost." *State v. Johnson*, — N.C. App. —, —, 667 S.E.2d 313, 315 (2008) (citation and quotation marks omitted). As defense counsel requested the second reading of the report, defendant lost the benefit of his objection to Detective Smith's reading of her report to the jury. This argument is overruled.

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## III. Jury Instructions

[2] Defendant next contends that the trial court committed plain error by not providing a limiting instruction regarding Mary's testimony about sexual conduct between Mary and defendant when the family lived in Florida, that Mary became pregnant in Florida, and that Mary had informed her principal and police in Florida about the sexual conduct. All of the offenses for which defendant was charged or convicted occurred when Mary was age 14 or older and occurred in North Carolina. The defendant concedes that he did not request a limiting instruction regarding Mary's testimony about sexual contact by defendant prior to their move to North Carolina and this assignment of error should be reviewed for plain error pursuant to N.C. R. App. P. 10(a)(4).

For defendant's argument that the trial court committed plain error to succeed, defendant must show that

the claimed error is a 'fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,' or 'where [the error] is grave error which amounts to a denial of a fundamental right of the accused,' or the error has 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' or . . . where it can be fairly said 'the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.'

*State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation omitted). "In order to prevail under a plain error analysis, defendant must establish not only that the trial court committed error, but that absent the error, the jury probably would have reached a different result." *State v. Steen*, 352 N.C. 227, 269, 536 S.E.2d 1, 25-26 (2000) (citation and quotation marks omitted), *cert. denied*, 531 U.S. 1167, 148 L. Ed. 2d 997 (2001).

Even assuming *arguendo* that it was error for the trial court to not provide a limiting instruction regarding Mary's testimony regarding events in Florida, we conclude that it did not rise to the level of plain error. The record in the case *sub judice* contains overwhelming evidence of defendant's guilt of each offense charged, including defendant's own admissions to Detective Smith regarding the details and timing of his sexual contact with Mary and the fact that he fathered her child and her baby which was aborted as well as defendant's own testimony at the domestic violence hearing regard-

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ing his sexual contact with Mary. Defendant has not assigned as error the admission of his own statements and admissions. In light of all the evidence presented as to defendant's guilt, we conclude that even if a limiting instruction had been given, it is not probable that the jury would have reached a different result as to any of defendant's charges. *Steen*, 352 N.C. at 269, 536 S.E.2d at 25-26. Accordingly, we find no plain error and this assignment of error is overruled.

## IV. Satellite-Based Monitoring

[3] Lastly, defendant contends and the State concedes that the trial court erred by ordering defendant to enroll in lifetime satellite based monitoring ("SBM") without ordering a risk assessment and following the other procedures that are required by N.C. Gen. Stat. § 14-208.40A (2007).

N.C. Gen. Stat. § 14-208.40A(a) states that

(a) When an offender is convicted of a reportable conviction as defined by G.S. 14-208.6(4), during the sentencing phase, the district attorney shall present to the court any evidence that (i) the offender has been classified as a sexually violent predator pursuant to G.S. 14-208.20, (ii) the offender is a recidivist, (iii) the conviction offense was an aggravated offense, or (iv) the offense involved the physical, mental, or sexual abuse of a minor. The district attorney shall have no discretion to withhold any evidence required to be submitted to the court pursuant to this subsection.

During the sentencing phase, pursuant to N.C. Gen. Stat. § 14-208.40A(b), the trial court found that defendant was not a sexually violent predator or a recidivist and that the conviction offense was not an aggravated offense. The trial court also found that defendant had been convicted of a reportable conviction, defendant had committed "offenses against a minor" and ordered defendant to enroll in lifetime SBM upon the completion of his sentence. However, in the context of SBM, N.C. Gen. Stat. § 14-208.6(1i) (2007) defines "offense against a minor" as "any of the following offenses if the offense is committed against a minor, and the person committing the offense is not the minor's parent: G.S. 14-39 (kidnapping), G.S. 14-41 (abduction of children), and G.S. 14-43.3 (felonious restraint)." Defendant was not convicted of any of the offenses listed in N.C. Gen. Stat. § 14-208.6(1i) and defendant was the minor's adoptive parent. Therefore the court's finding that defendant had committed "offenses against a minor" was in error.

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The State argued at trial that defendant was subject to SBM because he was convicted of an offense involving “the physical, mental, or sexual abuse of a minor” pursuant to N.C. Gen. Stat. § 14-208.40A(a)(iv). Statutory rape is, by definition, an offense involving the sexual abuse of a minor. *See* N.C. Gen. Stat. § 14-27.7A(a) (2005) (a defendant is guilty of statutory rape in if the defendant engages in vaginal intercourse or a sexual act with another person who is 13, 14, or 15 years old and the defendant is at least six years older than the person.); *State v. Anthony*, 351 N.C. 611, 616, 528 S.E.2d 321, 324 (2000) (“The purpose of the statutory rape law is to protect children under a certain age from sexual acts.”) Here, defendant was convicted of an offense involving “the physical, mental, or sexual abuse of a minor[,]” as he was convicted of eight counts of statutory rape.<sup>2</sup> Upon the determination that the defendant was convicted of an offense involving “the physical, mental, or sexual abuse of a minor”, the trial court must then order the Department of Correction (“DOC”) to perform a risk assessment pursuant to N.C. Gen. Stat. § 14-208.40A(d), which provides that:

(d) If the court finds that the offender committed an offense that involved the physical, mental, or sexual abuse of a minor, that offense is not an aggravated offense, and the offender is not a recidivist, the court shall order that the Department do a risk assessment of the offender. The Department shall have a minimum of 30 days, but not more than 60 days, to complete the risk assessment of the offender and report the results to the court.

N.C. Gen. Stat. § 14-208.40A(d). Here, the trial court erred by not ordering this risk assessment of defendant.

After the risk assessment is completed, the trial court then must decide, based on the results of defendant’s risk assessment and any other evidence which may be presented by the State or defendant, whether defendant requires “the highest possible level of supervision and monitoring.” N.C. Gen. Stat. § 14-208.40A(e); *See State v. Morrow*, — N.C. App. —, —, 683 S.E.2d 754, 760-61 (2009) (“[A]ny proffered and otherwise admissible evidence relevant to the risk

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2. Because only one conviction of an offense involving “the physical, mental, or sexual abuse of a minor” is necessary for the defendant to be subject to SBM, and defendant was convicted of multiple counts of offenses which may subject him to SBM, we have addressed only the statutory rape convictions. We do not mean to suggest that statutory sex offense or sex offense in a parental role are not also offenses involving “the physical, mental, or sexual abuse of a minor;” we simply need not address these additional convictions for the purpose of determining whether this defendant may be *subject to* SBM, as one conviction will suffice.

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posed by a defendant should be heard by the trial court; the trial court is not limited to the DOC's risk assessment.") If the trial court determines that defendant requires "the highest possible level of supervision and monitoring" then "the court shall order the offender to enroll in a satellite-based monitoring program for a period of time to be specified by the court." N.C. Gen. Stat. § 14-208.40A(e).

Accordingly, we reverse the trial court's order of lifetime SBM for defendant, since the trial court did not follow the procedures in N.C. Gen. Stat. § 14-208.40A. We remand for a new SBM hearing, at which the trial court shall order that the DOC perform a risk assessment of defendant. After the risk assessment is done, at the determination hearing, the trial court shall determine whether defendant requires the highest possible level of supervision and monitoring, and if the trial court makes this determination, the court shall specify the period of time for which defendant must be enrolled in SBM pursuant to N.C. Gen. Stat. § 14-208.40A(e).

**AFFIRMED IN PART, REVERSED IN PART, and REMAND FOR FURTHER PROCEEDINGS.**

Judges GEER and ERVIN concur.

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STATE OF NORTH CAROLINA v. DION MAURICE STEELE, DEFENDANT

No. COA09-498

(Filed 5 January 2010)

**1. Drugs— trafficking in cocaine by possession—motion to dismiss—sufficiency of evidence—constructive possession**

The trial court did not err by denying defendant's motion to dismiss the charge of trafficking in cocaine by possession based on constructive possession and other incriminating evidence including that defendant fled when approached by police officers and he admitted the two packages of cocaine belonged to him.

**2. Sentencing— mitigating factor—failure to show substantial assistance**

The trial court did not abuse its discretion in a trafficking in cocaine by possession case by failing to find that defendant had

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offered substantial assistance to mitigate his sentence because the evidence showed that not only did defendant decline a plea bargain seven times, but the information he provided was of little or no use to authorities.

**3. Constitutional Law—right to confrontation—waiver**

The trial court did not err in a trafficking in cocaine by possession case by admitting into evidence a laboratory report that identified the recovered substance as cocaine without having the lab analyst who performed the tests testify because: (1) the State introduced the lab report at trial under N.C.G.S. § 90-95(g); and (2) defendant waived his right to confrontation by failing to object to the report at trial.

**4. Constitutional Law—effective assistance of counsel—failure to object—failure to show different outcome**

Although defendant contends he was denied effective assistance of counsel in a drug case based on defense counsel's failure to challenge the admissibility of a lab report, defendant failed to meet his burden of showing that the outcome of his trial would have been different.

Appeal by defendant from judgment entered 23 July 2008 by Judge Clifton E. Johnson in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 October 2009.

*Attorney General Roy Cooper, by Special Deputy Attorney General Susan K. Nichols, for the State.*

*John T. Hall for defendant-appellant.*

HUNTER, Robert C., Judge.

Dion Maurice Steele ("Defendant") appeals his conviction for trafficking in cocaine by possession, arguing that the trial court (1) erred by denying his motion to dismiss based on the insufficiency of the evidence to show possession; (2) abused its discretion by failing to find defendant had offered substantial assistance to mitigate his sentence; and (3) violated his rights to confrontation and effective counsel when a lab report was introduced into evidence without having the lab technician who performed the tests testify. We conclude that the trial court properly denied defendant's motion to dismiss and that it did not abuse its discretion in finding that defendant failed to provide substantial assistance. We further conclude that defendant

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waived his right to confrontation by failing to timely object to the challenged evidence under the applicable notice statute. Consequently, we uphold defendant's conviction.

Facts

The State's evidence tended to show the following facts at trial. On 24 October 2006, police officers with the Charlotte-Mecklenburg Police Department were searching for a suspect at a house owned by defendant's father. When the police officers arrived at the house, they saw an unknown man fitting the suspect's description flee into a wooded area behind the house. The unknown man, who was later identified as defendant, got tangled up in the underbrush and was taken into custody by the police officers.

The police officers did not immediately search the area where they apprehended defendant because the house had not yet been secured. The police officers handcuffed defendant and put him in the back of a police car. Defendant told the police that the house was one of his two residences, and he had fled because of an existing warrant. Defendant gave the police permission to search the house.

While some police officers were searching the house, others searched the area where defendant was apprehended and found a bag of cocaine. A detective then questioned defendant about the bag of cocaine, and defendant told him where he had purchased it, from whom he bought it, in what form he bought it, and that he had, in fact, thrown out two bags of cocaine during the pursuit. The police officers then searched again the area where defendant had been apprehended and found a second bag of cocaine.

The State charged defendant with trafficking in cocaine by possession and for having attained habitual felon status. At trial, a lab report indicating that the seized bags contained cocaine was admitted into evidence without the lab technician who generated the report testifying. On 22 July 2008, the jury found defendant guilty of trafficking in cocaine. Defendant subsequently pled guilty to the charge of having attained habitual felon status. Defense counsel introduced evidence of substantial assistance arising from defendant's offer to assist federal authorities; the trial court found the evidence unpersuasive and sentenced defendant to a presumptive-range term of 93-121 months in prison.

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Discussion*I. Insufficient Evidence*

**[1]** Defendant first argues that it was error to deny his motion to dismiss the charge of trafficking in cocaine by possession because there was insufficient evidence that he ever possessed the cocaine. A defendant's motion to dismiss should be denied if there is substantial evidence of: (1) each essential element of the offense charged and (2) defendant's being the perpetrator of the offense. *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002). "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *Id.* at 597, 573 S.E.2d at 869. On review of a denial of a motion to dismiss, this Court must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. *Id.* at 596, 573 S.E.2d at 869. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve. *Id.*

For the offense of trafficking cocaine by possession, the State is required to prove that defendant "possesse[d] 28 grams or more of cocaine . . . ." N.C. Gen. Stat. § 90-95(h)(3) (2007). Possession of a controlled substance may be actual or constructive. *State v. McLaurin*, 320 N.C. 143, 146, 357 S.E.2d 636, 638 (1987). "A person has actual possession of a substance if it is on his person, he is aware of its presence, and either by himself or together with others he has the power and intent to control its disposition or use." *State v. Reid*, 151 N.C. App. 420, 428-29, 566 S.E.2d 186, 192 (2002). In contrast, constructive possession exists when the defendant, " 'while not having actual possession, . . . has the intent and capability to maintain control and dominion over' the narcotics." *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 270 (2001) (quoting *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986)). When a defendant does not have exclusive possession of the location where the drugs are found, the State is required to show "other incriminating circumstances" in order to establish constructive possession. *Id.* at 552, 556 S.E.2d at 271.

In the present case, the State proceeded at trial on the theory that defendant had constructive possession, thus requiring proof of other incriminating circumstances. Defendant argues, however, that the State failed to establish other incriminating circumstances sufficient to support a finding of constructive possession: "There was no physical contact between the defendant and the cocaine. The cocaine was

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not found in the defendant's house, on his property or on any premises exclusively controlled by the defendant." Evidence of "physical contact," however, is evidence directed to actual possession, and constructive possession of narcotics may still be established by "other incriminating circumstances" where defendant does not have exclusive possession of the premises where the drugs were found. *Beaver*, 317 N.C. at 648, 346 S.E.2d at 480.

Here, other incriminating circumstances exist. The evidence in the case tends to show that defendant fled when approached by police officers. Police officers found both the first and second packages of cocaine a few feet from where defendant was apprehended in the woods. Defendant admitted that the cocaine found was his and told the detective that there were, in fact, two cocaine packages to be found. Defendant explained from whom he bought the cocaine, where he bought it, how much he paid for it, and in what form he bought it. Further, one of defendant's residences was also only approximately 200-300 feet from where police officers found the two cocaine packages.

This evidence is sufficient to deny defendant's motion to dismiss. *See, e.g., State v. Butler*, 356 N.C. 141, 147-48, 567 S.E.2d 137, 141 (2002) (finding sufficient incriminating circumstances to survive a defendant's motion to dismiss when a taxicab driver felt the defendant "struggling" in the backseat behind him and pushing against the front seat, and the police found drugs under the seat 12 minutes later); *State v. Turner*, 168 N.C. App. 152, 156, 607 S.E.2d 19, 22-23 (2005) (holding evidence of constructive possession sufficient when evidence included defendant's "close proximity to the controlled substance and conduct indicating an awareness of the drugs"); *State v. Neal*, 109 N.C. App. 684, 687-88, 428 S.E.2d 287, 290 (1993) (allowing a jury to infer constructive possession where a defendant ran from a bathroom where cocaine was later discovered); *State v. Harrison*, 93 N.C. App. 496, 498-99, 378 S.E.2d 190, 192 (1989) (holding that constructive possession could be inferred from the incriminating circumstances of a defendant attempting to flee from a room where illegal drugs were found).

When the evidence in the present case is viewed in the light most favorable to the State, as required on a motion to dismiss, there is sufficient evidence of incriminating circumstances to permit a jury to reasonably infer defendant's possession of the cocaine. Therefore, the trial court properly denied defendant's motion to dismiss.

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## II. Substantial Assistance

[2] Defendant next argues that the trial court abused its discretion by failing to find that defendant had offered substantial assistance to mitigate his sentence. With respect to a defendant's claim that he or she provided substantial assistance, this Court has held:

whether a trial court finds that a criminal defendant's aid amounts to substantial assistance is *discretionary*. The reduction of the sentence is also in the judge's discretion, even if the judge finds substantial assistance was given. To overturn a sentencing decision, the reviewing court must find an abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play.

*State v. Robinson*, 177 N.C. App. 225, 232-33, 628 S.E.2d 252, 256-57 (2006) (internal alterations, citations, and quotation marks omitted). N.C. Gen. Stat. § 90-95(h)(5) provides, in relevant part:

The sentencing judge *may* reduce the fine, or impose a prison term less than the applicable minimum prison term provided by this subsection, or suspend the prison term imposed and place a person on probation when such person has, to the best of his knowledge, provided substantial assistance in the identification, arrest, or conviction of any accomplices, accessories, co-conspirators, or principals if the sentencing judge enters in the record a finding that the person to be sentenced has rendered such substantial assistance.

(Emphasis added.) In other words, N.C. Gen. Stat. 90-95(h)(5) is a "provision exchanging *potential* leniency for assistance. . . . It is the only provision in the trafficking statutory scheme which gives a sentencing judge the *discretion* not to impose the statutorily mandated minimum sentence and fine." *State v. Willis*, 92 N.C. App. 494, 499, 374 S.E.2d 613, 616 (quoting *State v. Baldwin*, 66 N.C. App. 156, 159-60, 310 S.E.2d 780, 782, *aff'd*, 310 N.C. 623, 313 S.E.2d 159 (1984)), *disc. review denied*, 324 N.C. 341, 378 S.E.2d 808 (1989)).

In the present case, defendant sent letters to the District Attorney's office "trying to be of some sort of assistance." Defendant met with federal authorities to look at pictures and discuss certain individuals in which they were interested. According to defense counsel, if defendant would assist federal authorities in controlled buys on the street and plead guilty to the trafficking charge, the prosecutor

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would drop defendant's habitual felon charge. The State offered this deal to defendant not once, but seven times. Defendant chose not to accept each time. As a result of the information that defendant did provide to federal authorities by looking at pictures in the initial meeting, defendant's trial counsel admitted that "his assistance did not result in a prosecution or testimony against anyone else[,]" and "I don't think any prosecution came forward with it."

The trial court found "no mitigating factors" regarding defendant's sentencing, but defendant argues that "[u]nder all of the given circumstances, [the trial court's] ruling is so arbitrary that it cannot be the result of a reasoned decision." The evidence tends to show, however, not only that defendant declined the plea bargain seven times, but that the information he provided was of little to no use to authorities. *See State v. Myers and State v. Garris*, 61 N.C. App. 554, 557, 301 S.E.2d 401, 403 (1983) (finding no abuse of discretion by the trial court where the defendant provided SBI agents information and names relating to a homicide and to drug trafficking because, among other reasons, the SBI agent stated that the defendant's information had not revealed any new names or led to any convictions), *cert. denied*, 311 N.C. 767, 321 S.E.2d 153 (1984). The trial court, therefore, did not abuse its discretion by finding that defendant did not offer substantial assistance to mitigate his sentence.

### III. Right to Confrontation

[3] Defendant next argues that the trial court erred in admitting into evidence a laboratory report that identifies the recovered substance as cocaine without having the lab analyst who performed the tests testify because defendant was denied his constitutional right to cross-examine the analyst. Defendant also argues that he was denied his Constitutional right to effective assistance of counsel. We disagree with both contentions.

#### A. Right to Confrontation

"The Confrontation Clause of the Sixth Amendment bars admission of testimonial evidence unless the declarant is unavailable to testify and the accused has had a prior opportunity to cross-examine the declarant." *State v. Locklear*, 363 N.C. 438, 452, 681 S.E.2d 293, 304 (2009) (citing *Crawford v. Washington*, 541 U.S. 36, 68, 158 L. Ed. 2d 177, 203 (2004)); accord *State v. Lewis*, 361 N.C. 541, 545, 648 S.E.2d 824, 827 (2007). The United States Supreme Court has held, however, that "[t]he right to confrontation may . . . be waived, including by failure to object to the offending evidence; and States may adopt proce-

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dural rules governing the exercise of such objections.” *Melendez-Diaz v. Massachusetts*, 557 U.S. —, — n.3, 174 L. Ed. 2d 314, 323 n.3 (2009). Regarding these procedural rules,

[i]n their simplest form, notice-and-demand statutes require the prosecution to provide notice to the defendant of its intent to use an analyst’s report as evidence at trial, after which the defendant is given a period of time in which he may object to the admission of the evidence absent the analyst’s appearance live at trial. . . .

*Id.* at —, 174 L. Ed. 2d at 331. “It suffices to say that what [the Supreme Court] ha[s] referred to as the ‘simplest form [of] notice-and-demand statutes,’ . . . is constitutional[.]” *Id.* at — n.12, 174 L. Ed. 2d at 331 n.12.

North Carolina’s relevant notice-and-demand statute provides, in part, that

a report is admissible in a criminal proceeding in the superior court . . . only if:

- (1) The State notifies the defendant at least 15 days before trial of its intention to introduce the report into evidence under this subsection and provides a copy of the report to the defendant, and
- (2) The defendant fails to notify the State at least five days before trial that the defendant objects to the introduction of the report into evidence.

N.C. Gen. Stat. § 90-95(g). Under *Melendez-Diaz*, 557 U.S. at n.12, 174 L. Ed. 2d at 331 n.12, because § 90-95(g) only “require[s] the prosecution to provide notice to the defendant of its intent to use an analyst’s report as evidence at trial[.]” and then “the defendant is given a period of time in which he may object to the admission of the evidence absent the analyst’s appearance live at trial[.]” it constitutes the “simplest form [of] notice-and-demand statutes[.]” which is constitutional.

Here, the State expressly introduced the lab report at trial under § 90-95(g). There is no evidence that defendant objected to the admissibility of the lab report before trial, and defendant admits that he failed to object to the report at trial. Thus, defendant waived his right to confront the lab analyst under the Sixth Amendment. *Melendez-Diaz*, 557 U.S. at — n.3, 174 L. Ed. 2d at 323 n.3.

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*B. Ineffective Assistance of Counsel*

[4] Defendant next argues that he was deprived of effective assistance of counsel at trial. Defendant, however, failed to make his ineffective assistance of counsel claim the subject of any assignment of error, and, therefore, failed to properly preserve the issue for appellate review. N.C. R. App. P. 10(a) (2007).<sup>1</sup> See also *Dogwood Dev. & Mgmt. Co. LLC v. White Oak Transp. Co.*, 362 N.C. 191, 195-96, 657 S.E.2d 361, 364 (2008) (“[A] party’s failure to properly preserve an issue for appellate review ordinarily justifies the appellate court’s refusal to consider the issue on appeal.”).

Notwithstanding defendant’s failure to list this issue in his assignments of error, this Court has examined the record to determine whether any issues of arguable merit regarding the ineffective assistance of counsel claim exist.

The components necessary to show ineffective assistance of counsel are (1) “counsel’s performance was deficient,” meaning it “fell below an objective standard of reasonableness,” and (2) “the deficient performance prejudiced the defense,” meaning “counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.”

*State v. Garcell*, 363 N.C. 10, 51, 678 S.E.2d 618, 644 (2009) (quoting *Strickland v. Washington*, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 693 (1984)). Thus, “if a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel’s alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel’s performance was actually deficient.” *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 249 (1985).

Here, defendant states only that he “was denied his constitutional right[] to effective assistance of counsel. . . . [N]o action was taken at trial to challenge the admissibility of the hearsay statement contained in the lab report in order to preserve the error or to specifically bring the statements to the attention of the trial court.” The other evidence

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1. The assignments of error requirement of Rule 10 has been replaced with “[p]roposed issues on appeal [that] are to facilitate the preparation of the record on appeal and shall not limit the scope of the issue presented on appeal in an appellant’s brief.” N.C. R. App. P. 10 (2009). The new rule is “effective 1 October 2009 and applies to all cases appealed on or after that date.” N.C. R. App. P. 10. Since defendant appealed his convictions prior to 1 October 2009, the newly effective appellate rules do not apply.

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against the defendant, however, was overwhelming, as discussed above. The two facts that the lab report established, the identification of the seized substance as crack cocaine and its weight of 59.9 grams, were not critical to the State's case against defendant because evidence was presented tending to show that defendant admitted that the cocaine was his, and that defendant told a detective that it weighed two ounces, which is approximately 56 grams.

In light of this substantial evidence, defendant has not met his burden of showing that the outcome of his trial would have been different had his counsel challenged the admissibility of the lab report. Accordingly, defendant failed to establish any ineffective assistance of counsel.

**Conclusion**

Based on the foregoing, we hold that the trial court did not err in denying defendant's motion to dismiss the charge of trafficking in cocaine by possession; in failing to find that defendant had offered substantial assistance; and in allowing the State to enter into evidence a laboratory report without having the lab technician who performed the tests testify. Further, defendant's ineffective assistance of counsel claim is unpersuasive. We, therefore, find no error.

No Error.

Judges CALABRIA and GEER concur.

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STATE OF NORTH CAROLINA v. MAURICE SIMMONS, DEFENDANT

No. COA09-268

(Filed 5 January 2010)

**Search and Seizure— vehicle stop—white plastic grocery bag—cigar guts**

The trial court erred by denying defendant's motion to suppress marijuana found in a white plastic grocery bag in a passenger door storage compartment after defendant was stopped for not wearing a seat belt. The officer did not see or smell marijuana but asked what was in the bag and defendant responded "cigar guts." The record did no more than establish that defendant pos-

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sessed a legal item without providing any indication that the item was being used in an unlawful manner.

Appeal by Defendant from judgment entered 15 September 2008 by Judge William Z. Wood in Forsyth County Superior Court. Heard in the Court of Appeals 2 September 2009.

*Attorney General Roy Cooper, by Special Deputy Attorney General Richard E. Slipsky, for State.*

*Glenn Gerding, for defendant.*

ERVIN, Judge.

Defendant Maurice Simmons appeals from a judgment imposed by the trial court based upon his pleas of guilty to possession of marijuana with the intent to sell and deliver and felonious possession of marijuana and sentencing him to 24 months of supervised probation. On appeal, Defendant contends that the trial court erred by denying his motion to suppress evidence obtained during a search of his vehicle on the grounds that the investigating officer lacked probable cause to search a plastic bag contained in his vehicle. After careful consideration of the record in light of the applicable law, we are constrained to agree with Defendant's contention and award Defendant a new trial.

Factual Background

On 21 July 2007, Defendant was driving a 1978 Pontiac on Silas Creek Parkway in Winston-Salem when he was stopped by North Carolina State Highway Patrol Officer J.M. Byrd (Trooper Byrd) for failing to wear a seat belt. In the course of checking the status of Defendant's license, Trooper Byrd discovered that it had been revoked. As a result, Trooper Byrd cited Defendant for failing to wear a seatbelt and driving while license revoked.

While issuing the citations, Trooper Byrd noticed a white plastic grocery bag sticking out of the storage holder on the passenger-side door of Defendant's vehicle. Trooper Byrd testified that the "[grocery bag] was sticking out in plain view from my vantage point. . . ." He further stated that he immediately became suspicious that the bag contained contraband because he had found contraband in that sort of container on at least three prior occasions. Since he was unable to see the contents of the bag, Trooper Byrd asked Defendant what the bag contained. Defendant responded that the bag contained "cigar guts."

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After hearing Defendant's reference to "cigar guts," Trooper Byrd concluded that he had probable cause to search the bag for contraband. As a result, Trooper Byrd placed Defendant into his police vehicle for safety and contacted other troopers for assistance. Two troopers arrived and assisted Trooper Byrd in searching the vehicle. During the search, Trooper Byrd discovered that the white plastic bag contained marijuana.

On 21 July 2007, a Magistrate's Order was issued charging Defendant with felonious possession of marijuana and possession of marijuana with the intent to sell or deliver. On 24 March 2008, the Forsyth County grand jury returned a bill of indictment alleging that Defendant "unlawfully, willfully and feloniously did possess a controlled substance to wit: more than one and one-half ounces of marijuana" and "unlawfully, willfully and feloniously did possess with intent to sell and deliver a controlled substance, namely approximately 118 grams of marijuana." On 14 July 2008, Defendant filed a Motion to Suppress in which he sought the suppression of any evidence seized as a result of the search of his vehicle on the grounds that his vehicle "was unlawfully searched and property was seized by officers in violation of the Fourth Amendment to the United States Constitution and in violation of the North Carolina Constitution. . . ."

On 15 September 2008, Defendant's suppression motion came on for hearing before the trial court. After hearing the testimony of Trooper Byrd and the argument of counsel for Defendant and the State, the trial court denied the motion on the grounds that, "once the defendant said 'cigar guts,' I think the officer did have probable cause to see if there was any contraband associated with the cigar guts." After reserving his right to appeal the denial of his suppression motion as authorized by N.C. Gen. Stat. § 15A-979(b), Defendant entered pleas of guilty to felonious possession of marijuana and possession of marijuana with the intent to sell and deliver. Based upon Defendant's guilty pleas, the trial court consolidated the offenses in question for judgment and sentenced Defendant to a minimum of six and a maximum of eight months imprisonment in the custody of the North Carolina Department of Correction, and then suspended this sentence and placed Defendant on supervised probation for 24 months. Defendant noted an appeal to this Court from the trial court's judgment.

Discussion

In evaluating the correctness of a trial court's decision granting or denying a motion to suppress, its findings of fact are treated as con-

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clusive on appeal in the event that they are supported by competent evidence, even if the record contains evidence that would support a different finding. *State v. Downing*, 169 N.C. App. 790, 794, 613 S.E.2d 35, 38 (2005). In the event that the trial court's factual findings have adequate evidentiary support, the relevant question on appeal becomes whether the trial court's conclusions of law embody a correct legal standard and are supported by its factual findings. *State v. Coplen*, 138 N.C. App. 48, 52, 530 S.E.2d 313, 317, *cert. denied*, 352 N.C. 677, 545 S.E.2d 438 (2000). The trial court's conclusions of law are subject to *de novo* review on appeal. *State v. Mahaley*, 332 N.C. 583, 423 S.E.2d 58 (1992), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 649 (1995). Given that Defendant has failed to challenge any of the trial court's findings of fact as lacking sufficient record support, they are binding on appeal,<sup>1</sup> so that our review of the trial court's order denying Defendant's suppression motion is limited to determining whether the trial court's conclusion of law reflects a correct understanding of the applicable law and is supported by the trial court's findings of fact. *State v. Allison*, 148 N.C. App. 702, 704, 559 S.E.2d 828, 829 (2002).

In denying Defendant's suppression motion, the trial court found as a fact that:

Trooper J.M. Byrd stopped a two-tone 1978 Pontiac, a big car—it was, I think, blue and white—on Silas Creek Parkway here in Winston-Salem near the Hayworth-Miller Funeral Home. The reason he stopped the car was the driver-operator, who was the defendant, did not have a seatbelt or safety belt on.

He did find that the defendant was the operator or driver. He went to the driver's side of the vehicle, told the defendant that

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1. In his brief, Defendant contended that the trial court's findings that Trooper Byrd "detained [Defendant] in handcuffs and searched the bag;" that, "[o]nce other officers got there, he placed defendant in the patrol vehicle and called for two other or other troopers;" that "[t]wo of them arrived;" and that he "searched the vehicle and found marijuana in it" was contrary to the evidence since "Trooper Byrd testified that he placed Defendant in handcuffs and then placed him in the patrol car" and that, "[a]fter Defendant was in the patrol car[,] Trooper Byrd called other officers to the scene and did not search Defendant's car until after they arrived." However, given that the critical issue in this case is whether Defendant's comment that the plastic bag observed by Trooper Byrd contained "cigar guts" provided Trooper Byrd with probable cause to search the vehicle, any discrepancy between the evidence and the trial court's factual findings concerning the exact sequence of events in which Defendant was handcuffed, Defendant was placed into Trooper Byrd's patrol vehicle, additional law enforcement officers were called to the scene, and Defendant's vehicle was searched is not material to the outcome of this case.

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he was citing him for not wearing a seatbelt. The defendant gave him his driver's license and registration. The defendant did not appear nervous.

That the trooper went back to the patrol car and used his computer to check the—used either his computer or radio to check the status of the defendant's driver's licen[s]e and found that the defendant's driver's license was revoked.

Thereafter, he prepared a citation charging the defendant with a seatbelt violation and driving with license revoked. He went back to the driver's side of the defendant's vehicle. Defendant was still behind the steering wheel on that side.

He gave the citations to the defendant. Sometime during the second visit to the driver's side of the defendant's vehicle he looked at—it might have been before he gave the defendant the citations or it might have been after he gave him the citation, but he observed a white grocery bag—or white plastic grocery bag in the door on the passenger's side of the vehicle in a slot that was approximately 18 inches wide, going down the door from front to back, and about three to four inches from the inside of the car to the outside of the slot.

He asked—it was a white plastic grocery bag that, based on his experience, three prior arrests at least-or three prior seizures of marijuana, he had seen marijuana contained in similar grocery bags.

He asked the defendant what was in the bag because he was suspicious that the bag contained contraband, that—he'd found contraband, not marijuana, but contraband in that sort of bag or container on at least three prior occasions.

He asked again the defendant, "what's in the bag?" The answer from the defendant was "cigar guts." The officer took this to mean tobacco that had been removed from a cigar.

He had in the past seized marijuana with cigars. And based on his training he had heard-or learned that marijuana was sometimes placed inside cigars for the purpose of smoking the cigars. He mentioned Philly blunts as being what these were called. He could not think of any other reason to gut a cigar.

Thereafter, he felt that he had probable cause to search the bag. He detained [Defendant] in handcuffs and searched the bag.

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Once two other patrol officers got there, he placed the defendant in the patrol vehicle and called for two other—or other troopers. Two of them arrived. He searched the vehicle and found marijuana in it.

Based on this, the first—let me see if there’s anything else on cross. He could not see in the bag, noticed no smell of contraband. The bag was stuck down in the passenger’s-side door console.

And marijuana and cigars are sometimes associated, but not all times, based on the officer’s training and experience. The bag was in plain view, but its contents were not in plain view. The contents of the bag, from what the officer said, could not be more than three to four inches wide, because that was the width of the slot that it was placed in.

He was suspicious of the bag, and then he felt that the statement, “cigar guts,” was the—gave him probable cause to search the bag. Although he was suspicious and pretty much knew what was in the bag when he first saw it, he did not feel that he had grounds to search until he heard the words “cigar guts.”

Based upon these findings of fact, the trial court made the following conclusion of law:

And, [Defense counsel], if the officer had searched the first time he saw the bag, I’d be allowing your motion. But once the defendant said “cigar guts,” I think the officer did have probable cause to see if there was any contraband associated with the cigar guts.

The motion is denied. Again, without the statement “cigar guts,” I think it would probably be a good motion. Very close.

Thus, the trial court essentially concluded that, once Defendant stated that the bag that Trooper Byrd observed in Defendant’s vehicle contained “cigar guts,” he had probable cause to search the vehicle in question.

The fundamental issue<sup>2</sup> in dispute between the parties is whether Defendant’s statement to Trooper Byrd to the effect that the plastic

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2. The parties engage in considerable discussion in their briefs about the extent, if any, to which Defendant was arrested prior to the time at which Trooper Byrd searched Defendant’s Pontiac. However, since both parties agree that the ultimate issue before the Court is whether Trooper Byrd’s warrantless search and the resulting

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bag that Trooper Byrd observed in Defendant's Pontiac contained "cigar guts" provided Trooper Byrd with probable cause to search Defendant's vehicle.<sup>3</sup> "A search of a vehicle on a public roadway or public vehicular area is properly conducted without a warrant as long as probable cause exists for the search." *State v. Holmes*, 142 N.C. App. 614, 621, 544 S.E.2d 18, 22, *cert. denied*, 353 N.C. 731, 551 S.E.2d 116 (2001). An officer, in the exercise of his duties, has probable cause to search a vehicle if he or she has "a belief, reasonably arising out of the circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction." *State v. Martin*, 97 N.C. App. 19, 28, 387 S.E.2d 211, 216 (1990) (quoting *United States v. Ross*, 456 U.S. 798, 805, 72 L. Ed. 2d 572, 581 (1982) (quoting *Carroll v. United States*, 267 U.S. 132, 149, 69 L. Ed. 543 (1921))). As a result, the ultimate issue that we must resolve is whether information tending to show that a suspect is in possession of "cigar guts," without more, provides probable cause for a search of the suspect's vehicle.

The record clearly establishes, consistent with the trial court's findings of fact, that Trooper Byrd did not see or smell marijuana or any other contraband at the time that he looked inside Defendant's car. Instead, his decision to search Defendant's vehicle was motivated entirely by his understanding of the meaning of the expression "cigar guts." Trooper Byrd testified that:

part of our training and experience is to listen to people who use marijuana, the way they talk, how they describe how they use it. You know, I just have been around folks that know. You know, you hear it in the rap songs. You hear it in all the videos and everything, Philly blunts, you know, talking about marijuana, talking about gutting cigars with marijuana.

So, I mean, that statement to me, along with the observation of the bag, which, you know, in the past I had found to contain contraband, in my mind raised it to the level of plain-view search.

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seizure of the marijuana which Defendant plead guilty to possessing was supported by the requisite probable cause and since the State does not appear to argue that Trooper Byrd's search of Defendant's vehicle should be treated as an investigatory detention rather than a "full blown" search, we do not believe that it is necessary for us to resolve the issue of whether Trooper Byrd arrested Defendant or merely subjected him to an investigatory detention at the time that he handcuffed him and placed him in his patrol vehicle.

3. The validity of Trooper Byrd's initial decision to stop Defendant for operating a vehicle without wearing a seat belt and driving while license revoked has not been challenged on appeal.

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According to Trooper Byrd, based on his “training and experience, there’s only one reason to gut cigars” and “[t]hat’s to place contraband in it.” On the other hand, Trooper Byrd testified that the term “cigar guts” means tobacco. Put another way, the expression “cigar guts” refers to the tobacco inside a cigar as compared to the wrapper. Trooper Byrd acknowledged on cross-examination that there is nothing unlawful about possessing “the tobacco inside of the cigars.” Trooper Byrd also admitted that, prior to this incident, he had never seized cigars containing contraband. Even so, he claimed “that[,] sometimes they do coincide” and that, on “some” occasions, he had seized marijuana in the vicinity of cigars.

The circumstances surrounding a particular seizure must be “viewed as a whole through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training.” *State v. Green*, 146 N.C. App. 702, 707, 554 S.E.2d 834, 836 (2001) (citations omitted). As Trooper Byrd admitted, the possession of “cigar guts” or loose tobacco is not illegal in and of itself. As a result, the information available to Trooper Byrd sufficed to support a reasonable belief that Defendant’s vehicle contained contraband or evidence of a crime only if “cigar guts” and contraband are so inherently interrelated that the mere presence of “cigar guts,” without more, suffices to establish a reasonable probability that contraband will be present as well.

Although the State has cited a number of cases in its brief involving the presence of loose tobacco, *State v. Jacobs*, 162 N.C. App. 251, 253, 590 S.E.2d 437, 439 (2004) (stating during the recitation of the facts that the investigating officer, while examining the interior of a car, recovered a bundle of bills and noticed an odor of marijuana and the presence of loose tobacco that the officer believed to have come from hollowed-out cigars used to smoke marijuana); *People v. Shabazz*, 301 App. Div. 2d 412, 413, 755 N.Y.S.2d 20, 22 (2003) (holding that the trial court properly denied the defendant’s motion to suppress the search of a car since a bag that had been thrown from the car contained a cigar that had been modified for the purpose of smoking marijuana and since loose tobacco or marijuana could be seen on the floorboard of the car); *People v. Mays*, 190 Misc. 2d 310, 315-17, 738 N.Y.S.2d 152, 157-58 (2001) (holding that a suppression motion should be denied since the defendant showed signs of impairment, since defendant was parked near a nightclub which was “a problem” at 4:00 a.m., and since there was a pile of loose tobacco in defendant’s car), the parties have not provided us with any authority tending to show that the mere presence of “cigar guts,” standing alone, is suffi-

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cient to justify a finding of probable cause. Instead, the available decisions tend to show merely that the presence of loose tobacco, along with other factors, may suffice to support a valid search and seizure. Thus, given that all of the cases dealing with loose tobacco are factually distinguishable from this case, we have no choice except to attempt to decide this case on the basis of general principles of search and seizure law.

Although our review of the record in light of the applicable law forces us to agree with the trial court's determination that this is a close case, we believe, on balance, that Defendant's statement that the plastic bag contained "cigar guts," without more, does not suffice to establish the probable cause necessary to support a search of Defendant's vehicle. Although Trooper Byrd testified that cigars from which the tobacco has been removed and replaced with marijuana had become a popular means of consuming controlled substances, that evidence tended to establish the existence of a link between the presence of hollowed out cigars and the presence of marijuana rather than the existence of a link between the presence of loose tobacco and the presence of marijuana. Furthermore, the record is completely devoid of any evidence tending to show that Defendant was stopped in a drug-ridden area or at an unusual time of day or that Trooper Byrd had any basis, apart from Defendant's admission that the plastic bag contained "cigar guts," for believing that Defendant had been involved in the manufacture, use, or distribution of "Philly Blunts." Thus, reduced to its essence, the record does no more than establish that Defendant possessed a legal item without providing any indication that this item was being used in an unlawful manner. Although "it is well settled that the probable cause determination does not require hard and fast certainty by an officer, but involves more of a common-sense determination," *State v. Briggs*, 140 N.C. App. 484, 493, 536 S.E.2d 858, 863 (2000), a finding of probable cause must be supported by more than mere suspicion. After careful consideration, we are unable to conclude that Defendant's admission that the plastic bag that Trooper Byrd observed in his vehicle contained "cigar guts," without more, sufficed to support a finding of probable cause to believe that Defendant's Pontiac contained contraband or evidence of a crime. As a result, since the trial court erred by reaching a contrary conclusion and denying Defendant's suppression motion, we conclude that Defendant is entitled to a new trial.

NEW TRIAL.

Judges GEER and STROUD concur.

**STATE v. MEADOWS**

[201 N.C. App. 707 (2010)]

STATE OF NORTH CAROLINA v. JOHN KENNEDY MEADOWS, DEFENDANT

No. COA08-1576

(Filed 5 January 2010)

**Evidence— expert testimony—chemical analyst—results of NarTest machine—reliability**

The trial court abused its discretion in a possession of cocaine and possession of drug paraphernalia case by allowing an officer to testify as an expert chemical analyst and in admitting evidence of results from a NarTest machine because it was not an accepted method of analysis or identification of controlled substances. Controlled substances defined by their chemical composition can only be identified through the use of chemical analyses and not through lay testimony based on visual inspection.

Appeal by defendant from judgment entered on or about 30 July 2008 by Judge Benjamin G. Alford in Superior Court, Onslow County. Heard in the Court of Appeals 18 August 2009.

*Attorney General Roy A. Cooper, III, by Assistant Attorney General Amy C. Kunstling, for the State.*

*Anne Bleyman, for defendant-appellant.*

*Tharrington Smith, L.L.P., by Elisa J. Cyre and Roger W. Smith, for Amicus Curiae.*

STROUD, Judge.

Defendant was convicted by a jury of possession of cocaine and possession of drug paraphernalia. Defendant appeals on the grounds that the trial court erred by admitting expert testimony on the identity of a controlled substance based on the results of a NarTest machine. We find defendant's argument as to the State's failure to demonstrate the reliability of the NarTest machine to be dispositive, and we order a new trial.

**I. Background**

The State's evidence tended to show that on the evening of 19 May 2007, Detective Jack Edward Springs of the Onslow County Sheriff's Office was "traveling around the Belgrade area" of Onslow County when he saw "all the signs and symptoms of . . . an illegal act" on Front Lane. Detective Springs got out of his car and concealed

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himself in “the hedge and darkness” in order to approach a suspicious vehicle. Defendant got out of the suspicious vehicle. Detective Springs shined his flashlight onto defendant. Defendant threw a plastic bag with white contents to the ground. The contents of the plastic bag were analyzed by Captain John Lewis of the Onslow County Sheriff’s Office by using a NarTest machine, which displayed test results that the substance was crack cocaine. On or about 8 January 2008, defendant was indicted for possession with intent to manufacture, sell, and deliver cocaine, manufacturing cocaine, and possession of drug paraphernalia. Defendant was also indicted as a habitual felon. After a jury trial, defendant was convicted of possession of cocaine and possession of drug paraphernalia. Defendant was determined to have a prior felony record level of four and was sentenced to 120 to 153 months imprisonment. Defendant appeals.

**II. NarTest Machine**

Defendant argues “the trial court committed error in allowing Captain Lewis to testify as an expert chemical analyst and in admitting evidence of the unproven and unreliable NarTest machine in violation of [defendant’s] State and Federal Rights.” (Original in all caps.) We agree. Over defendant’s objection, the trial court allowed Captain Lewis to testify that the NarTest machine is “an instrument that has been designed to analyze certain controlled substances. It is technology that is available to law enforcement agencies to analyze items that they believe to contain controlled substance schedule two, both cocaine hydrochloride and cocaine base marijuana.”

“[A] trial court’s ruling on the qualifications of an expert or the admissibility of an expert’s opinion will not be reversed on appeal absent a showing of abuse of discretion.” *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004) (citations omitted).

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

N.C. Gen. Stat. § 8C-1, Rule 702. The Supreme Court of North Carolina enumerated a three-step analysis for the trial court to determine the admissibility of opinion testimony from an expert witness: “(1) Is the expert’s proffered method of proof sufficiently reliable as an area for expert testimony? (2) Is the witness testifying at trial qualified as an

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expert in that area of testimony? (3) Is the expert's testimony relevant?" *Howerton* at 458, 597 S.E.2d at 686 (citations omitted).

The trial court must first consider whether Captain Lewis's use of the NarTest machine was "sufficiently reliable as an area for expert testimony" and we must determine if the trial court abused its discretion in making such a determination. *See id.* "[T]o determine whether an expert's area of testimony is considered sufficiently reliable, a court may look to testimony by an expert specifically relating to the reliability, may take judicial notice, or may use a combination of the two." *Id.* at 459, 597 S.E.2d at 687 (citation and quotation marks omitted).

In this case, Captain Lewis did not testify as to the reliability of the NarTest machine beyond his own experience with it; in other words, Captain Lewis did not testify about the methodology used by the NarTest machine to perform its analysis, but only about how it is used. We are not aware of any cases in which the NarTest machine has been recognized as an accepted method of analysis or identification of controlled substances in North Carolina or in any other jurisdiction in the United States. We therefore cannot base any conclusions as to reliability of the NarTest machine upon Captain Lewis's testimony or judicial notice.

As the NarTest machine is a new technology which has not yet been addressed by any appellate court, our first consideration is whether the trial court abused its discretion in determining the reliability of the NarTest machine. *See Howerton* at 458, 597 S.E.2d at 686.

Where . . . the trial court is without precedential guidance or faced with novel scientific theories, unestablished techniques, or compelling new perspectives on otherwise settled theories or techniques, a different approach is required. Here, the trial court should generally focus on the following nonexclusive indices of reliability to determine whether the expert's proffered scientific or technical method of proof is sufficiently reliable: *the expert's use of established techniques, the expert's professional background in the field, the use of visual aids before the jury so that the jury is not asked to sacrifice its independence by accepting the scientific hypotheses on faith, and independent research conducted by the expert.*

Within this general framework, reliability is thus a preliminary, foundational inquiry into the basic methodological adequacy of an area of expert testimony.

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*Id.* at 460, 597 S.E.2d at 687 (emphasis added) (citation, quotation marks, and brackets omitted).

We will therefore first consider whether the NarTest machine is an “established technique[.]” *Id.* The trial court recognized Captain Lewis as a “certified chemical analyst in the use of the NarTest” machine.<sup>1</sup> However, Captain Lewis did not testify as to any “established techniques[.]” *Id.* Captain Lewis testified only about the NarTest machine and the operation of the machine to analyze presumably illegal substances. Captain Lewis testified that when he tests a substance which he believes to be cocaine, he mixes it with reverse osmosis water.

It is allowed to sit in that fluid for several minutes and then you draw some of the fluid out of your test tube that is put into a cell and that is placed into the instrument and then it is begun. The instrument shines a light through it and depending on the light waves or the florescence that is received on the other side by the computer the computer determines what controlled substance it is.

“[O]nce you get your initial positive for cocaine there is one drop of reagent that is added and that is analyzed as well.” The NarTest machine then prints out its results. Captain Lewis did not testify as to the specific type of testing which is done by the NarTest machine beyond stating that it uses “florescence.” The State did not present any evidence which would indicate that the NarTest machine uses an “established technique[.]” *id.*, for analysis of controlled substances or that the NarTest machine has been recognized by experts in the field of chemical analysis of controlled substances as a reliable testing method.

Furthermore, Captain Lewis did not testify as to any other testing methods currently used to identify controlled substances and how the NarTest machine compares with those methods. During the trial, Captain Lewis admitted he had absolutely no evidence that the NarTest machine was even accurate beyond the fact that the NarTest laboratory confirmed his NarTest machine results. In fact, on cross-examination Captain Lewis was asked, “So, is it not fair to say that

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1. We note that all of the prior North Carolina cases which we have been able to find which address testimony by a “certified chemical analyst” are regarding those individuals with permits from the North Carolina Department of Health and Human Services who test for “a person’s alcohol concentration.” See N.C. Gen. Stat. § 20-139.1 (2007). Captain Lewis was not recognized as a “certified chemical analyst” as the term is used in N.C. Gen. Stat. § 20-139.1.

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the results are only as accurate as the testing device?” to which Captain Lewis responded, “Yes.” Therefore, the State did not present any evidence that the NarTest machine or the testing methodology used by the machine is an “established technique[.]” *Id.*

Next, we must consider Captain Lewis’s “professional background in the field” of identification of controlled substances. *Id.* At the time of defendant’s trial Captain Lewis had worked for the Sheriff’s Office for thirteen years and supervised the narcotics unit for approximately two and one-half years. Captain Lewis had also attended “basic law enforcement training[.]” OCADETF conferences, “schools dealing with informants, controlled substance investigations[.]” a five-day NarTest course, and a one-day follow-up training session on the NarTest machine. Captain Lewis has also been certified by NarTest’s manufacturer to operate the NarTest machine. However, Captain Lewis was “not a chemist by trade[.]” had not attended “any college training in regard to being a chemist[.]” and was not aware of the chemical makeup of cocaine or what would occur when it was mixed with other substances.

The State argues that Captain Lewis should be permitted to testify regarding use of the NarTest machine because he was trained and certified in its use. In *State v. Roach* regarding the issue of testimony from a certified chemical analyst this Court stated:

A person administering a chemical analysis test must be qualified to administer the test in order to testify as to the results. It is not sufficient for the State to establish that the test administrator possesses a license to conduct the test. Instead, *the State is required to show that the test administrator possesses a permit issued by the appropriate agency, and that the officer possessed such permit at the time of the administration of the test.*

*State v. Roach*, 145 N.C. App. 159, 161, 548 S.E.2d 841, 843 (2001) (emphasis added) (citations omitted). However, the NarTest machine has not been designated as an approved method of identification of controlled substances by the State of North Carolina or any agency of the State. Captain Lewis admitted that he did not possess any “permit issued by the appropriate agency” regarding the NarTest machine. *Id.* Indeed, no agency of the State of North Carolina issues any sort of certification in use of the NarTest machine. Thus, although Captain Lewis has a “professional background” in law enforcement, he has no relevant “professional background” in the field of chemical analysis of controlled substances. *Id.*

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There was no evidence presented in this case as to the last two *Howerton* factors as to reliability. *See Howerton* at 460, 597 S.E.2d at 687. No “visual aids” were presented before the jury to demonstrate the use of the NarTest machine or how the machine works nor did Captain Lewis testify as to any “independent research” he had conducted regarding either identification of controlled substances or the NarTest machine. *Id.*

Although the factors as examined *supra* are not exclusive, we note that the focus of our inquiry must be the trial court’s ruling on the reliability of the method of testing. *See id.* The State did not present any evidence of the reliability of the NarTest machine beyond Captain Lewis’s opinion that it was reliable based upon his personal experience of using the machine and the fact that some of the test results had been confirmed by the NarTest manufacturer. Indeed, the State’s evidence does not even describe the method of analysis the NarTest machine uses or how it works; the evidence is simply that you put the substance to be analyzed into the machine and the machine uses “florescence” to determine what the substance is and prints out a result. The State did not present any evidence independent of information from the NarTest’s manufacturer which would establish its reliability; although such information might exist, it is not in the record before us. We cannot find that the NarTest machine is sufficiently reliable based upon the evidence presented.

As the State failed to proffer evidence to support any of the “indices of reliability” under *Howerton* or any alternative indicia of reliability, we conclude that “the expert’s proffered method of proof [is not] sufficiently reliable as an area for expert testimony[.]” *Id.* at 458-60, 597 S.E.2d at 686-87. Without a “sufficiently reliable” method of proof, expert testimony was not properly admissible, and we need not address whether “the witness testifying at trial qualified as an expert in that area of testimony” and whether “the expert’s testimony [was] relevant[.]” *Id.* at 458, 597 S.E.2d at 686. Accordingly, allowing Captain Lewis to testify as to the results of the NarTest machine was an abuse of discretion.

Besides Captain Lewis’ testimony regarding the NarTest machine, the only other evidence the State presented that defendant was in possession of cocaine was Detective Springs’ testimony that he “collected what [he] believe[d] to be crack cocaine.” However, “existing precedent suggests that controlled substances defined in terms of their chemical composition can only be identified through the use of

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a chemical analysis rather than through the use of lay testimony based on visual inspection.” *State v. Ward*, — N.C. App. —, —, 681 S.E.2d 354, 371 (2009), *disc. review allowed*, — N.C. —, — S.E.2d —, 2009 WL 3329529 (Oct 08, 2009) (No. 365PA09).

In *Ward*, the

[d]efendant kept and sold controlled substances that were identified solely using the visual identification evidence that [this Court] . . . concluded was erroneously admitted. In each instance, it is not at all clear . . . that, except for the erroneous admission of this visual identification evidence, the evidence would have sufficed to support a conviction. As a result, [this Court] conclude[d] that Defendant [wa]s entitled to a new trial in connection with each of those convictions.

*Ward* at —, 681 S.E.2d at 373. As the NarTest machine results and Detective Spring’s visual identification were the only evidence that defendant possessed cocaine *and* as both were admitted erroneously, defendant was prejudiced and must receive a new trial.

### III. Conclusion

We conclude that the trial court erred in allowing Captain Lewis to testify as to the results of the NarTest machine. As we are ordering that defendant receive a new trial, we need not consider defendant’s other arguments.

NEW TRIAL.

Judges WYNN and BEASLEY concur.

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[201 N.C. App. 714 (2010)]

PHYLLIS FORD, GEORGE S. BASON, JR., ANTHONY J. D'ANNA, SANDRA BASON, BARBARA D'ANNA, JAMES LIDDLE, ED MORRAH, PETA CLAYTON, BRAD CLAYTON, CAROL K. NORTON, ROBERT O. EVERETT, BARBARA EVERETT, DENNIS ANDREWS, JANET R. ANDREWS, JAMES GOODSON, JAMIE GOODSON, CHARLES M. PRINCELL, ERNEST W. CRAWFORD, WENDY S. TAYLOR, EVELYN BALL, R.T. BALL, PAULA S. HALL, MARK A. RUMLEY, CATHY K. RUMLY, JAMES R. McADAMS, ANN TROLLINGER, STAN MORGAN, PAT MORGAN, J. MICHAEL ELLIS, ELEANOR THOMPSON, GWEN HOYT, JAMES K. PRUITT, G.D. DODSON, JR., MYLES S. BEAMAN, CAROLYN M. BEAMAN, MARIE B. CHAVIS, WARNER L. CHAVIS, JR., MARYLIN S. SAVERY, REX T. SAVERY, JR., ANDREW L. PRYCE, REBECCA A. PRYCE, WILBUR SUGGS, HOWARD M. MALINSKI, HAROLD AYSUCUE, MARVIN RAYE McINTYRE, PATRICIA McINTYRE, MARY ANN LAKE, CHARLES E. LAKE, AMOS FISHER, VICKY FRYE, JEAN PRUITT, RONALD WITHERBY, LOIS WITHERBY, RUSSELL JOHNSON, BETH JOHNSON, THOMAS GLENN, EMILY T. AYSUCUE, TOMMY LOY, SHEILA LOY, VIRGINIA GAIL MILLER, RALPH WADLINGER, LINDA HIGGINS, MARY LEE MALINSKI, RONALD W. SORRELL, RICHARD HATCHER, BETTY HATCHER, INGSBORG WARSCHKOW, RONALD LEE NORTON, JACQUELINE HEADEN, WADE L. HEADEN, TINA WALLACE, DUNCAN WALLACE, PATRICIA LORENZ, PATRICIA S. GUMULA, MICHAEL G. GUMULA, JANET NAVE, EDWARD MACHESKI, VICKI COON, DOUG COON, L.G. YOUNTS, WILLIAM H. RITTER, EMILY AYSUCUE, U. DEAN HALL, BENNIE HALL, AND JEFFREY D. HALL, PLAINTIFFS v. WILL C. MANN, VIRGINIA M. MANN, OPEN GOLF CENTER, LLC, CEDAR FOREST ASSOCIATES I, LLC, CEDAR FOREST ASSOCIATES II, LLC, EULISS, INC., TAR HEEL LAND GROUP, LLC, SUNTRUST BANK, VANTAGESOUTH BANK, CAPITAL BANK, AS SUCCESSOR TO FINANCIAL FIRST FEDERAL SAVINGS BANK, AND JIHHAD LIBBUS, PIEDMONT CRESCENT COUNTRY CLUB, INC., AND THE TOWN OF SWEPSONVILLE, NORTH CAROLINA, A NORTH CAROLINA MUNICIPAL CORPORATION, DEFENDANTS

No. COA09-677

(Filed 5 January 2010)

**Appeal and Error—interlocutory order—failure to show substantial right**

Plaintiffs' appeal from the trial court's interlocutory order dismissing their claims as to only the Euliss defendants and striking plaintiffs' notice of *lis pendens* only as to the Euliss defendants' property was dismissed because it did not dispose of all claims and defendants, and plaintiffs failed to demonstrate it affected a substantial right.

Appeal by plaintiffs from order entered 15 December 2008 by Judge Abraham Penn Jones in Alamance County Superior Court. Heard in the Court of Appeals 4 November 2009.

**FORD v. MANN**

[201 N.C. App. 714 (2010)]

*Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by Derek J. Allen and Andrew T. Tripp, for plaintiff-appellants.*

*Horack, Talley, Pharr & Lowndes, P.A., by Robert B. McNeill and Zipporah B. Edwards, for defendant-appellees Tar Heel Land Group, LLC, VantageSouth Bank, and SunTrust Bank.*

*Sparrow Wolf & Dennis, P.A., by Donald B. Sparrow, James A. Gregorio, and J. Michael Thomas, for defendant-appellees Euliss, Inc. and SunTrust Bank.*

STEELMAN, Judge.

Where the trial court dismissed plaintiffs' claims as to only the Euliss defendants and struck plaintiffs' notice of *lis pendens* only as to the Euliss defendants' property, the order is interlocutory. Since plaintiffs failed to demonstrate that the order affected a substantial right, this appeal must be dismissed.

I. Factual and Procedural Background

On 26 March 2008, plaintiffs filed a complaint against a number of defendants, which included defendants Euliss, Inc., Tar Heel Land Group, LLC, SunTrust Bank, and VantageSouth Bank (Euliss defendants). This appeal pertains only to the dismissal of plaintiffs' claims against the Euliss defendants, and our discussion of the factual and procedural background will focus primarily on the claims against those parties.

Plaintiffs' complaint alleged that plaintiffs are owners of "real property adjacent to or in the vicinity of" a certain tract of land located in Alamance County containing approximately 170 acres, including a golf course and club house and being formerly known as Piedmont Crescent Country Club (Club). In 1985, Club conveyed the property to defendant Will C. Mann (Mann), upon the condition that Mann would continue to operate the property as a golf course. Simultaneously with the 1985 deed, Mann gave Club the option to repurchase the property for three years, and a right of first refusal to purchase the property until 4 April 2005. In 1995, Mann and Club executed an agreement terminating the reversionary rights contained in the 1985 documents, and simultaneously executed a Declaration of Covenants, Conditions, and Restrictions upon the property. Mann also executed and recorded at that time a right of first refusal for the property through 2015 to the "Quarry Hills Advisory Board," an entity that the complaint acknowledges was not in existence at that time.

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In 2004, Mann amended the restrictions to limit their applicability to the portion of the property used for the golf course. At that time, the right of first refusal was modified to limit its application to the golf course, and to shorten its expiration date to 4 April 2005. In 2005, a second amendment to the restrictions was recorded that permitted Mann to relocate the golf course to other portions of the property. In 2006, a portion of the property was conveyed to defendant Cedar Forest Associates I (Cedar). In 2006, Mann and Cedar recorded a Termination of Restrictive Covenants. On 13 December 2006, Cedar conveyed a portion of the property to defendant Euliss, Inc. (Euliss). Euliss executed a deed of trust in favor of defendant SunTrust Bank, secured by a portion of the property. On 4 May 2007, Mann conveyed a portion of the property to defendant Tar Heel Land Group, LLC (Tar Heel). Tar Heel executed a deed of trust in favor of defendant VantageSouth Bank, secured by a portion of the property. Club was administratively dissolved on 9 June 2005.

Plaintiffs' complaint alleged that they are the intended beneficiaries of the restrictions placed upon the property, that the restrictions were improperly terminated, and that the parties to whom Mann conveyed portions of the property are "not intending to use the Property for the purposes originally intended in the 1985 Deed, the 1995 Declaration and the Agreement." Plaintiffs seek a declaration that the first amendment, second amendment, and termination of the restrictions are invalid, and that the property is subject to the 1985 and 1995 restrictions. Plaintiffs seek monetary damages for breach of contract and unjust enrichment from Mann. Plaintiffs filed a notice of *lis pendens* on the property.

On 30 July 2008, the Euliss defendants all served motions to dismiss plaintiffs' complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure and to cancel the *lis pendens*. On 15 December 2008, Judge Jones' order was filed, dismissing plaintiffs' claims as to all of the Euliss defendants and striking the *lis pendens* as to property owned by Euliss and Tar Heel. Plaintiffs appeal.

## II. Appeal of Interlocutory Order

Appeals from the trial division in civil cases are permitted only by statute. *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). Appeals from interlocutory orders are only permitted in exceptional cases where a party can demonstrate that the order affects a substantial right under N.C. Gen.

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Stat. § 1-277.<sup>1</sup> See *id.*; *Parrish v. R.R.*, 221 N.C. 292, 296, 20 S.E.2d 299, 302 (1942); *Cole v. Trust Co.*, 221 N.C. 249, 251, 20 S.E.2d 54, 55 (1942); *Hosiery Mill v. Hosiery Mills*, 198 N.C. 596, 598, 152 S.E. 794, 795 (1930); *Leak v. Covington*, 95 N.C. 193, 195 (1886); *Welch v. Kinsland*, 93 N.C. 281, 282 (1885). A party is not permitted to appeal an interlocutory order because they believe that the ruling places them at a tactical disadvantage at the trial of the case. Nor is an order appealable because all the parties wish to have it appealed. The parties cannot by consent confer jurisdiction of a non-appealable interlocutory order upon the appellate courts. See *Wiggins v. Insurance Co.*, 3 N.C. App. 476, 478, 165 S.E.2d 54, 56 (1969) (“Jurisdiction cannot be conferred by consent where it does not otherwise exist . . . .” (citation omitted)). To be appealable, the appellant must be able to clearly articulate why the order affects a substantial right as provided in N.C. Gen. Stat. § 1-277. The reason for this rule was set forth by Justice Ervin in *Veazey v. Durham*:

There is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders. The rules regulating appeals from the Superior Court to the Supreme Court are designed to forestall the useless delay inseparable from unlimited fragmentary appeals, and to enable courts to perform their real function, *i.e.*, to administer “right and justice . . . without sale, denial, or delay.” N.C. Const., Art. I, Sec. 35.

*Veazey*, *supra* at 363-64, 57 S.E.2d at 382. Interlocutory appeals, in addition to delaying the final resolution of the cases, impose a substantial financial burden upon all the litigants involved.

Rule 28(b) of the North Carolina Rules of Appellate Procedure has a specific provision dealing with interlocutory appeals:

(b) *Content of appellant’s brief.* An appellant’s brief in any appeal shall contain, under appropriate headings and in the form prescribed by Rule 26(g) and the Appendixes to these rules, in the following order:

. . . .

(4) *A statement of the grounds for appellate review.* Such statement shall include citation of the statute or statutes permitting

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1. We note that there was no certification of the order of the trial court pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure.

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appellate review. . . . When an appeal is interlocutory, the statement must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.

N.C.R. App. P. 28(b)(4) (2009).

Since the order before us did not dispose of all claims and defendants, it is interlocutory. *See Daily v. Popma*, 191 N.C. App. 64, 67, 662 S.E.2d 12, 15 (2008) (holding the order granting the defendant's motion to dismiss was an interlocutory order because plaintiff's claims against the other defendant remained pending); *Pratt v. Staton*, 147 N.C. App. 771, 773, 556 S.E.2d 621, 623 (2001) ("An order . . . granting a motion to dismiss certain claims in an action, while leaving other claims in the action to go forward, is plainly an interlocutory order.").

Plaintiffs set forth two bases for their assertion that Judge Jones' interlocutory order is appealable under N.C. Gen. Stat. § 1-277. First, they contend that the striking of the *lis pendens* affects a substantial right. Second, they contend the order forecloses "their effort to obtain relief as to the real property owned by Defendant-Appellees and finally determines the action as to Defendant-Appellees—namely, the enforceability of the land-use restrictions at issue here." Plaintiffs cite no case authority in support of their arguments for the appealability of the trial court's order. *See* N.C.R. App. P. 28(b)(6). Plaintiffs do not assert that Judge Jones' ruling exposes them to a possibility of inconsistent verdicts. It is not the responsibility of the appellate courts to research and create arguments to support an appellant's right to appeal from an interlocutory order. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994). We thus limit our analysis to the arguments made by plaintiffs.

In *Auction Co. v. Myers*, 40 N.C. App. 570, 253 S.E.2d 362 (1979), Godley Auction Company, Inc. sought to compel the owner of real estate to convey real estate to the purchaser at an auction sale conducted by Godley. *Id.* at 570-71, 253 S.E.2d at 363. Incident to the complaint, a notice of *lis pendens* was filed on the real estate. *Id.* at 571, 253 S.E.2d at 363. The defendant filed motions to dismiss pursuant to Rules 12(b)(6) and 12(b)(7) of the Rules of Civil Procedure, and a motion to strike the *lis pendens*. *Id.* All motions were denied by the trial court, and the defendant appealed. *Id.* This Court dismissed the appeal as interlocutory. *Id.* at 574, 253 S.E.2d at 365.

## FORD v. MANN

[201 N.C. App. 714 (2010)]

In discussing the notice of *lis pendens*, this Court held that

defendant has failed to show that any substantial right of his has been impaired by the trial court's refusal to cancel the notice of *lis pendens*. He certainly has not shown that the trial court's interlocutory order "will work an injury to him if not corrected before an appeal from the final judgment."

*Id.* (quotation omitted). We hold that in the instant case, plaintiffs have also failed to show the impairment of a substantial right that would be lost absent immediate appeal. In their brief, plaintiffs allege that both Euliss and Tarheel "have constructed single-family residences on portions of the golf course and in the line of play of the driving range" and that "two tennis courts, the swimming pool, the driving range, the Number 1 Green and the Number 9 tee box all have been destroyed." This construction has already occurred and cannot be the basis of the impairment of a substantial right. No facts are recited or arguments made in plaintiffs' brief that show the Euliss defendants intend to immediately develop their property further in a manner contrary to the 1985 and 1995 restrictions. N.C.R. App. P. 28(b)(4). Plaintiffs have failed to demonstrate a substantial right supporting the immediate appealability of the trial court's order.

As to plaintiffs' argument that they will not be able to obtain relief sought as to the property owned by the Euliss defendants, there has been no showing that they cannot obtain the relief sought through an appeal taken at the conclusion of the case. *See Frost v. Mazda Motor of Am., Inc.*, 353 N.C. 188, 194, 540 S.E.2d 324, 328 (2000) ("If appellant's rights 'would be fully and adequately protected by an exception to the order that could then be assigned as error on appeal after final judgment,' there is no right to an immediate appeal." (quotations omitted)).

This appeal is interlocutory and must be dismissed.

DISMISSED.

Judges ELMORE and HUNTER, JR., Robert N. concur.

**HARBOUR POINT HOMEOWNERS' ASS'N, INC. v. DJF ENTERS., INC.**

[201 N.C. App. 720 (2010)]

HARBOUR POINT HOMEOWNERS' ASSOCIATION, INC., BY AND THROUGH ITS BOARD OF DIRECTORS, INDIVIDUALLY AND IN ITS REPRESENTATIVE CAPACITY ON BEHALF OF ITS MEMBERS, PLAINTIFF V. DJF ENTERPRISES, INC., FORREST DEVELOPMENT COMPANY, INC., DAVY GROUP CONSTRUCTION, INC., WRANGELL HOMES, INC., HPPI INVESTMENTS, LLC, COASTAL ROOFING COMPANY, INC., GEORGIA-PACIFIC CORPORATION, AND CRAFTMASTER MANUFACTURING, INC., DEFENDANTS

No. COA09-527

(Filed 5 January 2010)

**Appeal and Error—interlocutory orders—order denying arbitration—substantial right not affected**

An appeal from an order denying a motion to compel arbitration was dismissed as interlocutory where the arbitration clause in a warranty agreement was permissive. Defendant would not be deprived of a substantial right absent immediate review.

Appeal by defendant, Georgia-Pacific Corporation, from judgment entered 20 November 2008 by Judge John W. Smith in New Hanover County Superior Court. Heard in the Court of Appeals 1 October 2009.

*Block, Crouch, Keeter, Behm & Sayed, L.L.P., by Auley M. Crouch, III, and Christopher K. Behm, for plaintiff-appellees.*

*Ellis & Winters, L.L.P., by Richard W. Ellis, Matthew W. Sawchak, Stephen D. Feldman, and Andrew S. Chamberlin, for defendant-appellant.*

HUNTER, JR., Robert N., Judge.

Defendant, Georgia-Pacific Corporation, appeals from the trial court's order denying its motion to compel arbitration and to stay proceedings. We affirm the trial court's order and dismiss defendant's appeal as interlocutory, not affecting a substantial right. *See Boynton v. ESC Med. Sys., Inc.*, 152 N.C. App. 103, 566 S.E.2d 730 (2002).

**I. Factual Background**

Harbour Point is a subdivision consisting of ninety (90) townhome units located at Carolina Beach, New Hanover County, North Carolina. The subdivision was built between 10 January 2001 and 28 March 2005 by defendant contractors, DJF Enterprises, Inc., Forest Development Company, Inc., Davy Group Construction, Inc., Wrangell Homes, Inc., and HPPI Investments, LLC ("defendant con-

**HARBOUR POINT HOMEOWNERS' ASS'N, INC. v. DJF ENTERS., INC.**

[201 N.C. App. 720 (2010)]

tractors"). During the construction of forty-eight (48) of the Harbour Point Subdivision townhome units, PrimeTrim, an exterior wood trim product designed and manufactured by defendant Georgia Pacific ("Georgia Pacific"),<sup>1</sup> was installed around the windows and doors, and also used as band boards and corner boards.

On 22 February 2008, plaintiff, Harbour Point Homeowner's Association, Inc. ("plaintiff"),<sup>2</sup> filed a complaint against defendants, DJF Enterprises, Inc., Forrest Development Company, Inc., Davy Group Construction, Inc., Wrangell Homes, Inc., HPPI Investments, LLC, Coastal Roofing Company, Inc., Georgia-Pacific Corporation, and Craftmaster Manufacturing, Inc., asserting various causes of action relating to the allegedly defective construction of the Harbour Point Subdivision townhomes. Plaintiff specifically alleged in counts 10 through 13 that Georgia-Pacific's PrimeTrim product was defective and asserted causes of action and claims for relief for (1) breach of express warranties, (2) negligence, and (3) North Carolina Products' Liability pursuant to N.C. Gen. Stat. § 99B-1 (2009).

On 30 October 2008, Georgia-Pacific, based on the language of a "PrimeTrim Thirty Year Limited Warranty," filed a motion to compel arbitration and stay litigation of plaintiff's claims against Georgia-Pacific. Georgia-Pacific's motion was predicated upon the contention that the following language of the "PrimeTrim Thirty Year Limited Warranty" created a binding, mandatory arbitration agreement with plaintiff:

If a claim under the foregoing warranty is not resolved to the owner's satisfaction, upon the written request of the owner or claimant, Georgia-Pacific agrees to submit any and all disputes relating to the scope, coverage or application of the foregoing warranties, or to the nature or amount of any compensation due hereunder, to binding arbitration under the terms and conditions then in effect of the American Arbitration Association or any successor thereto.

*This warranty states the entire liability of Georgia-Pacific with respect to the product named above, and nothing herein shall*

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1. Georgia-Pacific LLC, is the successor in interest to defendant, Georgia-Pacific Corporation, and is a Delaware limited liability corporation with a principal place of business in Georgia.

2. Homeowners within the Harbor Point townhome subdivision assigned all claims and causes of action against defendants to Harbour Point Homeowners' Association, Inc.

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*extend the duration of any implied warranties—including implied warranties of merchantability or fitness for a particular person—beyond the duration of said warranties, if any, under applicable state law. Under no circumstances will Georgia-Pacific be liable for incidental or consequential damages arising out of negligence, tort, breach of warranty, contract, strict liability, or any other basis. All such damages are specifically excluded herein.*

Plaintiff contends that it did not consent to arbitration via any “PrimeTrim Thirty Year Limited Warranty” or, in the alternative, even if an arbitration clause was contained in the warranty, the alleged arbitration clause was permissive and compellable only at the owner’s request. Georgia-Pacific concedes that the language of the arbitration agreement could be ambiguous; however, it avers that any ambiguity should be resolved in favor of Georgia-Pacific by reading the italicized language in the paragraph immediately succeeding the arbitration clause in tandem with the language of the clause.

Prior to ruling on the motion, the trial court reviewed twenty-five (25) affidavits of Harbour Point townhome owners, stating that they did not receive a “PrimeTrim Thirty Year Limited Warranty” and were not aware of an arbitration clause. Moreover, Harbour Point Homeowners’ Association, through an affidavit of then President of its Board of Directors, Robert J. Schladensky, stated that it did not enter into negotiations obligating the parties to resolve disputes via arbitration with defendants DJF Enterprises, Inc., Wrangell Homes, Inc., or Georgia-Pacific.

On 20 November 2008, the trial court entered an order denying Georgia-Pacific’s motion to compel arbitration and to stay litigation of certain claims citing numerous justifications for its holding. The trial court concluded that the arbitration clause contained in the “PrimeTrim Thirty Year Limited Warranty” explicitly gives a purchaser or subsequent owner like the plaintiff complete control over whether an issue arising under the agreement will be arbitrated; therefore, plaintiff cannot be compelled to arbitrate pursuant to the language of the warranty. The court found that “the italicized paragraph read in tandem with the arbitration clause leaves only a unilateral statement of consent by Georgia-Pacific that it agrees to submit to arbitration if, and only if, it is requested by Plaintiff in writing for a breach of the foregoing warranties.”

The court noted that, although plaintiff’s complaint drafted prior to discovery in good faith refers to a “Thirty Year Limited Warranty,”

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it appears that some of the Harbour Point townhomes were constructed using PrimeTrim prior to the May 2003 drafting of the "Thirty Year Limited Warranty." Furthermore, the trial court explained that Georgia-Pacific "failed to show that any Harbour Point homeowner ever received a copy of the Thirty Year Limited Warranty, signed any document that acknowledged receipt of the Thirty Year Limited Warranty, was otherwise aware of its provisions at the time of the construction and/or purchase of their individual townhouses at Harbour Point, or any other evidence demonstrating that there was a valid arbitration agreement between Georgia-Pacific and one or more of the Harbour Point homeowners." Finally, the court concluded that Georgia-Pacific failed to show that plaintiff, or anyone through whom it is making its claims, knowingly agreed to the terms of arbitration; thus there was no meeting of the minds between the parties.

On 25 November 2008, Georgia-Pacific filed notice of appeal of the trial court's order.

## II. Interlocutory Appeal

Georgia-Pacific contends that the trial court erred in determining that the arbitration clause is permissive and does not give Georgia-Pacific the right to compel plaintiff to arbitrate.

We note that Georgia-Pacific's appeal is from an interlocutory order. Generally, there is no right to appeal an interlocutory order, unless the trial court's decision affects a substantial right of the appellant which would be lost absent immediate review. *Boynton*, 152 N.C. App. at 105-06, 566 S.E.2d at 731 (2002). Our court has long held that " '[t]he right to arbitrate a claim is a substantial right which may be lost if review is delayed, and an order denying arbitration is therefore immediately appealable.' " *Hobbs Staffing Serv., Inc. v. Lumbermens Mut. Cas. Co.*, 168 N.C. App. 223, 225, 606 S.E.2d 708, 710 (2005) (quoting *Boynton v. ESC Med. Sys., Inc.*, 152 N.C. App. 103, 106, 566 S.E.2d 730, 732 (2002)).

"Whether a dispute is subject to arbitration is an issue for judicial determination." *Id.* Our review of the trial court's determination is de novo. *Id.* Pursuant to this standard of review,

"[t]he trial court's findings regarding the existence of an arbitration agreement are conclusive on appeal where supported by competent evidence, even where the evidence might have supported findings to the contrary. Accordingly, upon appellate review, we must determine whether there is evidence in the

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record supporting the trial court's findings of fact and if so, whether these findings of fact in turn support the conclusion that there was no agreement to arbitrate."

*Pressler v. Duke University*, — N.C. App. —, —, S.E.2d —, — (2009) WL 2783756 2009 (quoting *Sciolino v. TD Waterhouse Investor Servs., Inc.*, 149 N.C. App. 642, 645, 562 S.E.2d 64, 66 (2002)).

A two-part analysis must be employed by the court when determining whether a dispute is subject to arbitration: "'(1) whether the parties had a valid agreement to arbitrate, and also (2) whether 'the specific dispute falls within the substantive scope of that agreement.'" *Id.*

"'The law of contracts governs the issue of whether there exists an agreement to arbitrate. Accordingly, the party seeking arbitration must show that the parties mutually agreed to arbitrate their disputes.'" *D & R Const. Co., Inc. v. Blanchard's Grove*, — N.C. App. —, —, 667 S.E.2d 305, 307 (2008) (citation omitted).

In its order, the trial court held that the language of the arbitration clause within the "PrimeTrim Thirty Year Limited Warranty" was permissive and binding only if plaintiff requests to arbitrate in writing. Moreover, based on its review of the twenty-five affidavits submitted by Harbour Point homeowners, the trial court noted that Georgia-Pacific failed to show that plaintiff was aware of an obligation to arbitrate. The court concluded there was no evidence on record that "Plaintiff or anyone through whom it is making its claims knowingly agreed to the terms of arbitration" and, as such, there was "no meeting of the minds between the parties."

Our review of the record indicates that there is competent evidence to support the trial court's finding that the PrimeTrim warranty's arbitration clause is permissive, not mandatory. In pertinent part, the arbitration clause provides the following:

If a claim under the foregoing warranty is not resolved to the owner's satisfaction, upon the written request of the owner or claimant, Georgia-Pacific agrees to submit any and all disputes relating to the scope, coverage or application of the foregoing warranties, or to the nature or amount of any compensation due hereunder, to binding arbitration under the terms and conditions then in effect of the American Arbitration Association or any successor thereto.

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Without reaching the issue of whether plaintiff received notice of an arbitration clause, we note that the underlined portion of the arbitration agreement clearly establishes that only the “owner” may elect arbitration by written request. Pursuant to well settled contract law principles, the language of the arbitration clause should be strictly construed against the drafter of the clause. *See Edwards v. Insurance Co.*, 173 N.C. 614, 92 S.E. 695 (1917); *Contracting Co. v. Ports Authority*, 284 N.C. 732, 202 S.E.2d 473 (1974); *Novacare Orthotics & Prosthetics E., Inc. v. Speelman*, 137 N.C. App. 471, 528 S.E.2d 918 (2000). As such, based on the language drafted by Georgia-Pacific, Georgia-Pacific does not have a right to compel plaintiff to submit to arbitration.

Accordingly, we hold that Georgia-Pacific’s appeal is interlocutory due to the permissive language of the PrimeTrim arbitration clause. We conclude that defendant would not be deprived of a substantial right which would be lost absent immediate review by withstanding a trial on the merits. The trial court’s order denying Georgia-Pacific’s motion to compel arbitration is affirmed and defendant’s appeal is dismissed.

Affirmed.

Judges STEPHENS and BEASLEY concur.

## CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 5 JANUARY 2010)

ARCE v. MOUNTAIN WOOD FORESTRY, INC. No. 09-490	Indus. Comm. (IC571046)	Affirmed
CARSON v. GOODMAN No. 09-574	Alexander (05CVD549)	Dismissed
GREENE v. RICHARDSON No. 09-271	Wake (06CVD3216)	Dismissed
HOJNACKI v. LAST REBEL TRUCKING, INC. No. 09-460	Indus. Comm. (PH1787) (IC702970)	Reversed and Remanded
I-CONN HEALTHCARE v. ADVANCED INTERNET No. 09-81	Cumberland (07CVS1580)	Affirmed
IN RE A.M.S., B.L.S., J.M.B. No. 09-1027	Brunswick (08JT150-152)	Affirmed
IN RE A.T. No. 09-813	Wilkes (08JA76)	Affirmed
IN RE J. M., I.T., JR., E.T. No. 09-757	Onslow (03J203) (03J204) (03J202)	Affirmed
IN RE J.P. No. 09-901	Watauga (06J41)	Reversed and Remanded
IN RE S.A.C. AND H.K.D. No. 09-919	Orange (07JT145) (07JT144)	Vacated in part; reversed and remanded in part
RICKMAN v. WOODARD No. 09-963	Jackson (08CVS307)	Dismissed
STATE v. BAKER No. 09-655	Cabarrus (08CRS7288) (08CRS51481)	No Error
STATE v. BOOTHE No. 09-264	Forsyth (07CRS56035) (07CRS7689) (07CRS56038) (07CRS56033) (07CRS56041) (07CRS56036) (07CRS7704)	Vacated in part, no error in part

	(07CRS56039)	
	(07CRS56034)	
	(07CRS535)	
	(07CRS56042)	
	(07CRS56037)	
	(07CRS7705)	
	(07CRS56040)	
STATE v. BRYANT No. 09-657	Forsyth (08CRS52639)	No Error
STATE v. GERVIN No. 09-480	Wake (04CRS34911)	No Error
STATE v. HAUSER No. 09-717	Forsyth (04CRS38050) (04CRS58108) (04CRS38051) (04CRS38049) (04CRS38052)	No Error
STATE v. INGRAM No. 09-616	Moore (08CRS51785)	No Error
STATE v. MIZELLE No. 09-509	Beaufort (06CRS53940)	No Error
STATE v. MOORE No. 09-817	Pitt (07CRS61681)	No Error
STATE v. MOORE No. 09-678	Beaufort (08CRS50399) (08CRS50401) (08CRS50396)	No Error
STATE v. PARKER No. 09-631	Polk (07CRS51087-88)	No Error
STATE v. POOLE No. 09-636	Onslow (07CRS57830)	No Error
STATE v. SHORT No. 09-603	Montgomery (08CRS50610)	Remanded for new sentencing hearing
STATE v. SPANN No. 09-503	Caldwell (07CRS03907) (07CRS03908) (07CRS03906)	No Error
STATE v. TURNER No. 09-933	Guilford (08CRS24432) (08CRS87274)	No Error
STATE v. WILLIAMS No. 08-1334	Wake (06CRS29842) (06CRS29841)	New trial

STATE v. WILLIAMS No. 09-743	Forsyth (06CRS23155) (06CRS24113) (06CRS58193)	No Error
TARDANI v. TARDANI No. 09-407	New Hanover (08CVD2641)	Affirmed
TAYLOR v. BATTS No. 09-196	Wilson (06CVS2107)	Affirmed

PRESENTATION OF THE RIBBON CUTTING FOR THE  
RENOVATED COURT OF APPEALS BUILDING

JANUARY 11, 2010



**OPENING REMARKS  
and  
RIBBON-CUTTING CELEBRATION  
by  
CHIEF JUDGE JOHN C. MARTIN**

GOOD MORNING: Almost 2 years ago, on the last day of January 2008, we gathered in the courtroom upstairs to commemorate the 40th Anniversary of the first session of this Court. At that gathering, we announced that this grand old building, which some say is second only to the Capitol in its classic beauty (and others say it might not be second) and has been the home of so many of the great institutions of our State government, and yet has suffered from inattention over those many years, would undergo a complete renovation. Today marks the completion of that process, which actually began over 4 years ago. It is a great day; a day for which so many of our present and former judges have been waiting for such a long time, indeed there has been talk of renovating this building at least since 1985, when I first came to this Court. It is a day which the current judges and staff of this Court have been acutely awaiting since May 2008 when we moved to temporary quarters. The wait is over—today, when we cut this ribbon and you have a chance to walk throughout the building, you will see that this is once again a building of which the citizens of North Carolina may be very proud, housing an institution of which they should also be very proud.

WELCOME TO EACH AND EVERY ONE OF YOU AND THANK YOU ALL SO VERY MUCH FOR COMING TO SHARE THIS OCCASION WITH US.

THERE ARE SO MANY SPECIAL GUESTS HERE THAT IF I TRIED TO RECOGNIZE AND NAME YOU ALL, WE WOULD BE LATE STARTING OUR 1 O'CLOCK SESSION. THERE ARE SOME FOLKS, HOWEVER, THAT I MUST SURELY GIVE A SPECIAL WELCOME.

We are particularly proud that our governor, Bev Perdue, could be with us today.

Our great Chief Justice and the Associate Justices of the Supreme Court—5 of whom are former members of this Court.

Members of the Council of State, including our Attorney General, Roy Cooper.

Members of the Governors Cabinet, especially Secretary of Administration Britt Cobb, whose department oversaw the renovations.

We welcome so many of our former colleagues who have returned to join us for this event, and are particularly honored that Mrs. Anne Saunders, the daughter of our first Chief Judge, Raymond Mallard, along with Mrs. Pat Hedrick, the wife of former Chief Judge Fred Hedrick, and Rose Vaughn Williams, the daughter of former Chief Judge Earl Vaughn are here. Our special thanks to Mrs. Saunders and her mother for their generosity in providing us with so many of Chief Judge Mallard's papers and other materials for our historical exhibit in the Court's gallery.

We are also glad that Stephanie Ross, who is the president of D. S. Simmons, Inc., our general contractor, and Paul Jeffreys, Vice President of Construction Services are here with us this morning.

Again, thank you all for coming.

THERE ARE SO MANY PEOPLE TO THANK FOR THEIR PART IN THE PROJECT:

- \* Former Gov. Mike Easley who recognized that the State's 2nd highest Court needed a safe and comfortable place to do its work and helped us secure the funding.
- \* Greg Driver of the State Construction Office for his perseverance and encouragement, and for his assistance in so many ways in getting this project underway.
- \* All of the people who had a hand in designing the project—
- \* We interviewed a number of architectural firms, and we picked the right one for this job—LS3P Associates—Katherine Peele, Leigh Stewart (headed design team), Doug Dorney, and their staff all did a great job in creating the plans for what we have here today,
- \* Ron Little from the State Construction office,
- \* From the Administrative Office of the Courts, Bill Stuckey,
- \* And from our Court, Doug McCullough, John Connell, Linda McGee, and Bob Northrup.

Our goal from the beginning was to marry the historical attributes of this beautiful old building with the efficiency and utility of a modern office, and I think you will agree, when you walk through, that our design team hit a home run.

A good design is only part of the picture, you need to get the right people to build the design. We knew this would not be a simple project, and we were looking for the best people to build it—we were so

fortunate that D.S. Simmons, Inc. submitted the most favorable bid, was awarded the contract, and then engaged so many talented subcontractors.

With Paul Jeffreys and job Superintendent John Breshears from D.S. Simmons, project architect David O'Shea from LS3P, Ron Little from State Construction, Bill Stuckey from AOC, and our own Appellate Court's IT staff, we truly had the "Dream Team" on this job. I should add that Bill Stuckey and his staff, Dawn Underwood, Brenda Allen, and Bonnie Goad, arranged for securing badly needed furnishings and equipment for us and arranged an almost painless move back to our offices.

I want you all to know that throughout the design phase, and the construction phase, every one of us was very mindful that as good stewards of the taxpayers' money, we were required to make the very best use of the available funds. Together, this team was able (1) to bring all of the Court's 91 employees under one roof for the first time in ten years; (2) provide a safe, comfortable, and efficient work space, (3) equip the Court with technological capacity which is, I believe, competitive with any state appellate court in the country; (4) to do that within budget, without wasting a single square foot or a single red cent. And the Court remained fully operational throughout the entire process and was not closed for even an hour because of it.

\* We also thank Danny Moody and the Supreme Court Historical Society for creating and mounting the beautiful exhibit on the third floor which chronicles the history of the Court. I think you will enjoy seeing it.

\* Finally, special thanks to Judge Linda McGee and her assistant, Peggy Seifert, for all of their hard work in arranging for this event.

Please join me in showing our appreciation to all of these folks.

I would now like to introduce to you Katherine Peele, Vice President and Principal in the Raleigh Office of LS3P Associates, and thereafter, Paul Jeffreys, Vice President of Construction Services for D.S. Simmons, Inc. for remarks. LS3P and D.S. Simmons are the sponsors of our reception which will follow the ribbon cutting, and LS3P also provided the invitations and printed program.

After we cut this ribbon, please join us for a reception in the third floor gallery.

Martin, Peele and Jeffreys cut the ribbon

## RIBBON CUTTING CELEBRATION

### REMARKS

by

**PAUL JEFFRIES, D.S. SIMMONS, INC.**

Thank you for inviting me to speak today. This is the second time that I have spoken to some of you, as you will recall that David O'Shea of LS3P/Boney and I talked last month at your Christmas gathering. At that time, David and I didn't realize that we were merely the warm-up act for the headline attraction, which was comprised of a select group of judges, who formed a chorus line and performed high kicks while singing the 12 days of trial to the tune of the 12 days of Christmas. If, God forbid, I am ever in a situation where I have to stand trial before some of the distinguished members of this court, I am going to have an extremely difficult time getting that image out of my head.

Today, I would like to talk briefly about some of the construction issues that were unique to this project. Obviously one of the major obstacles to our work was the limited space. The City allowed us to close one lane of Morgan Street, but in this small area, we had to store dumpsters, lifts and materials. There was virtually no room left for parking. Therefore, we contracted with one of the local parking companies and rented six spaces for our regular employees. However, less than a month into the project, we discovered that we could actually save money by parking on Fayetteville Street and paying the parking violations. We therefore cancelled our rental agreement and were happy to make weekly contributions to the city. I of course, as project manager, was more than happy to take full credit for this brilliant cost-saving strategy.

Almost immediately after mobilization, we began demolition activities. Within a month, we had taken the elevators out of service, and begun removal of the monumental stair, leaving no way to transport materials to the upper floors except by walking them up the two service stairs on either end of the building or by utilizing hydraulic lifts and passing materials through open windows. Needless to say, most everyone on site received their daily recommendation for aerobic activity while working here. Even so, a few of us still managed to gain a few pounds during the course of this project.

Once the old stairway was removed, we had an open shaft, extending from the basement all of the way through the roof, a total of (5) stories. We had to barricade this opening at every floor in order to pro-

vide proper fall protection for our employees. Additionally, there was an opening in the roof where the new skylight was to be installed. One of our greatest challenges was keeping this area dry and safe from the elements while completing the steel framing and waiting for the skylight and stairs to be fabricated off site. We were actually painting walls in the rest of the building while this 5-story shaft remained open. In total, we had a temporary enclosure on the roof for nearly five months.

In addition to protecting the new finishes, we had to protect some of the existing finishes, most notably in the third floor courtroom. I'm sure many of you are familiar with the extravagant plaster and painting that adorned the ceilings and walls. We had to maintain climate control in this one room for the duration of the project, even though the old heating and air conditioning system had been removed. Furthermore, about 2/3 of the way into the project, we discovered that the existing tile and floor system was badly deteriorated and had to be replaced. Eventually, we completed a major renovation in the courtroom that was originally to have been left untouched. We repaired the floor system and replaced the tile with carpet, replaced the curtain behind the Judge's bench with a paneled wall system and installed a state-of-the-art electronics package that has the ability to link with local TV stations. I think you'll find that the acoustics are much better in the courtroom now, and the upgrades are really spectacular. You should know that Judge Martin was instrumental in seeing that these improvements were made.

There are a few other changes to our original contract that bear mention. The plaster ceiling you see above you was restored by one of our specialty subcontractors who has performed this kind of work all over the world. Their resume actually included a history of work at Buckingham Palace. The guard desk you see here in the lobby is now reinforced with bulletproof glass and walls. The sidewalks and grassed areas at the building entrance are new and add a finishing touch to the entire project.

Finally, I believe that perhaps the most remarkable transformation is the basement area. When we arrived, that area was dark and damp with leaking pipes and failing plaster everywhere. Now, it's bright, with a break room and kitchenette. It houses a print room and a mailroom with a dumbwaiter that will deliver the mail to each floor, saving a lot of wear and tear on your mailroom clerk.

Please allow me to take a few moments to thank some of the members of the construction team that have been instrumental in the successful completion of this project. First, we have present the CEO of DSS, Cleve Paul and his daughter, our president Stephanie Ross. I would like to thank them for their leadership and integrity, and their commitment to quality that they instill in all of their employees. Next from DSS I would like to thank our superintendent, John Breshears and assistant superintendent John Breshears Jr. These guys are the first to arrive in the morning and the last to leave every evening and are responsible for every aspect of the project. I admire them for their work ethic and commitment, and I am fortunate to have John as both a co-worker and a friend.

LS3P/Boney is one of the premiere architectural firms in this state and we are always thrilled when we can land a project with them. David O'Shea was the construction administrator for LS3P and his participation was invaluable. To illustrate his level of commitment, I would like to tell you what happened to David near the end of this project. With about a month left to go, when we were trying to bring everything together and turn the building over for move-in, David's daughter became seriously ill and had to be hospitalized. We all feared that we would lose David at this critical juncture in the project, but he continued to stay in contact daily from the hospital. And although I could hear the worry and fatigue in David's voice, he continued to make calls and receive calls from his daughter's hospital room, apparently oblivious to the fact that his cell phone transmissions were wreaking havoc with the pacemaker patients in the cardiac wing.

Dewberry Engineering was responsible for design and oversight of the mechanical systems and I appreciate the contributions of Jim Ottmer and Johnny Wood of this firm.

Ron Little was our State Construction Officer and I would like to thank him for his practical approach to problem solving and his wise counsel throughout the course of this project.

For the user group, I believe that Bill Stuckey deserves special recognition. I'm not sure what Bill's official title is, but it should be something like "chief coordinator of all the aggravating and thankless tasks that absolutely no one else in their right mind would be willing to undertake." I don't know if he can fit all of that on his business card, but that's how it should read.

Finally, you should know that Judge Martin was responsible for many of the improvements and “creature comforts” that have been incorporated into this project. Carpet upgrades, courtroom changes, sidewalks and a long list of conveniences were the direct result of his input and perseverance. He even corrected spelling errors on some of the signage. We all owe him our thanks for his involvement and attention to detail.

In conjunction with an excellent group of subcontractors, namely Ivey Mechanical, Hawley Electric, M&M Plumbing and Allied Fire Protection, I can say without reservation that this is the best construction team that I have ever been privileged to be part of.

In closing, I would like to say that it has been a pleasure being involved in this project and meeting so many of you who will be using this building. In my brief interaction with you, it has become evident the respect and admiration you share for each other, and the commitment you have to upholding the laws of this state. It is my hope that the improvements made at this building will enhance your efficiency and ability to work together as you serve the people of North Carolina.

Thank you for allowing me to speak today and for providing D.S. Simmons the opportunity to be a part of this important project.

## REMARKS

by

**KATHERINE PEELE, LS3P ASSOCIATES**

Governor Perdue, Chief Judge Martin and Distinguished Guests:

Good morning.

I am very honored to represent LS3P Associates, on this exciting day, as we re-dedicate the historic Ruffin Building. The design of this project has been a true labor of love for our firm, to have the opportunity to breathe new life into this beautiful old structure.

In your program is some information about the history of the building, which was built in 1911. Over the years, the building has undergone numerous renovations. But, with this project, we were pleased to be able to restore some of the original character of the building, including the re-creation of this monumental stair in the center of the building, while also creating a modern office environment for the Court.

I'd like to thank the many people that were instrumental in bringing this project to reality. Thank you to Chief Justice Martin, Judge McGee and Bill Stuckey, as well as all of the Court of Appeals judges and staff for their tremendous help and patience in working thru the design and construction. Thanks also to the NC State Construction office, Greg Driver, Cindy Browning and our outstanding project manager, Ron Little. I'd also like to thank our wonderful contractor, DS Simmons, led by their project manager Paul Jeffreys and the awesome superintendent team of John Breshears and John Breshears Jr. This is the second time that our firm has had the pleasure of working with this great team from DS Simmons and I can't say enough about their professionalism and dedication to creating a quality end product for the Owner.

And, finally, thanks to our team at LS3P, most particularly our construction administrator, David O'Shea, for his hard work and perseverance in making sure all the details came together.

We are truly grateful to have been a part of this project—thank you for the wonderful opportunity to restore an architectural gem for the State of North Carolina.

**N.C. COURT OF APPEALS  
CELEBRATION HONORING THE**



**PRESENTATION OF THE PORTRAIT OF**

**R. A. "FRED" HEDRICK  
Chief Judge**

**NORTH CAROLINA COURT OF APPEALS**

**1984 - 1993**

**May 17, 2011**

## ***Robert Alfred “Fred” Hedrick***

Robert Alfred “Fred” Hedrick was born in Statesville, North Carolina on 23 August 1922. He graduated from the Governor Morehead School for the Blind in 1943, the University of North Carolina at Chapel Hill in 1946, and from its School of Law in 1949.

Hedrick served as Iredell County’s prosecuting attorney for eight years and as a judge on the Recorder’s Court in Statesville for 10 years. In 1969, Governor Robert Scott appointed Hedrick to the newly created North Carolina Court of Appeals. Hedrick served on the Court of Appeals for 24 years, eight of those years as the Court’s chief judge.

Colleagues and friends describe Hedrick as a gruff man with a big heart. His law clerks’ nickname for him was “Grudge.” His former colleagues say that Hedrick possessed a brilliant legal mind and an incredible memory. He wrote notes to himself using a Braille typewriter and dictated his opinions into a recorder to be transcribed. His law clerks say he was a perfectionist who insisted on getting his opinions done early.

Though Hedrick could not see, he was keenly perceptive about people and things taking place in the world around him. He was also known for his sharp sense of humor and devilish ability to play clever pranks on his unsuspecting colleagues and law clerks.

Hedrick was also well known for his love of music and a deep baritone voice, and he often sang at civic clubs, weddings, funerals, and in church choirs. He once sang with UNC classmate Andy Griffith before Griffith went on to television and movie fame.

In a 1970 newspaper story, Hedrick said, “I don’t feel I have accomplished anything unusual that a lot of other people couldn’t have done. I just hope that what I have done might serve to help the 10,000 people in North Carolina who are blind.”

## ***PROGRAM***

*CALL TO ORDER . . . . . Court Marshall*

*WELCOME . . . . . Chief Judge John Martin*

*INTRODUCTION . . . . . Judge Linda Stephens*  
*OF SPEAKERS*

*Missy Donovan*  
*Executive Assistant for Judge Hedrick*

*R.M. "Hoppy" Elliot*  
*Clerk for Judge Hedrick*

*Tricia Kerner Shields*  
*Clerk for Judge Hedrick*

*PRESENTATION OF*  
*RESOLUTION . . . . . Chief Judge John Martin*  
*ADJOURNMENT . . . . . Court Marshall*

**OPENING REMARKS**  
**by**  
**CHIEF JUDGE JOHN MARTIN**

Good afternoon, Ladies and Gentlemen, and welcome to this ceremonial session of the Court. Approximately two months ago, the family of Chief Judge R.A. “Fred” Hedrick made the very generous gift to this Court of Chief Judge Hedrick’s portrait. When I began to talk with Pat about a presentation ceremony, she told me she did not want a formal presentation; she asked if someone could just come over to their home and pick it up. Judge Stephens and I made an appointment, had a wonderful visit with Pat, and came back to the Court with the treasure that now hangs on this courtroom wall. But something was missing—we felt that our Court needed to recognize the wonderful gift and give others an opportunity to come and see it and reminisce about our old friend.

So, today, we welcome you to this celebration of the service rendered by Chief Judge R.A. “Fred” Hedrick not only to this Court but to North Carolina.

We especially welcome Pat Hedrick and her family and thank them again for this wonderful gift and for coming to be with us. Judge Hedrick’s daughter Marty and his sons Jeff and John, as well as John’s wife Tammy and their daughters, Jacqueline and McKenzie are here; we are glad you could be here. His daughter Joanna was not able to come but is with us in spirit and wishes she could be here in person.

There are a number of former members of the Court here this afternoon who served with Chief Judge Hedrick and I will try my best to see and recognize all of you, and if I miss anyone, please raise your hand or do something so that I may welcome you personally:

Chief Justice Sarah Parker

Former Chief Judge Gerald Arnold

Former Judges Jim Carson, Willis Whichard, Maurice Braswell, and Ralph Walker

Former Clerk of the Court of Appeals Francis Dail

There are also a number of other Judges with us this afternoon:

From the Supreme Court, Justice Robert Edmunds, Justice Robin Hudson, Justice Patricia Timmons-Goodson, Justice Paul Newby, Justice Barbara Jackson, and Clerk of the Supreme Court Christie Cameron.

From the Court of Appeals, Judge John Arrowood.

My wife Margaret is also here.

There are also a number of Judge Hedrick's former law clerks and executive assistants here who will be recognized by other speakers. We welcome all of you here today.

One of those former clerks, Linda Stephens, has served on this Court since 2006 and is largely responsible for putting this gathering together. Judge Stephens will make some remarks and introduce our speakers.

#### REMARKS

by

JUDGE LINDA STEPHENS

Thank you, Chief.

What a joy and an honor it is for me to add my personal welcome to each of you on this exceedingly special occasion to acknowledge and thank the members of Judge Hedrick's family for the wonderful gift of his portrait to our Court. I am delighted to see each of you, but I am especially thrilled and thankful that Pat and Jeff and John are able to be with us this afternoon.

Before I call on our speakers to share some memories of Judge Hedrick, I must respectfully dissent from Judge Martin's opinion that I am largely responsible for putting the program together. The only thing I am largely responsible for is knowing on whom I could rely to respond cheerfully and immediately to my pleas for help. With deep gratitude, I wish to recognize the following individuals for all they did to make this occasion a success:

Judge Calabria and her EA, Paula Broome. Paula has been with the Court for many years and was here during Judge Hedrick's tenure;

Judge Thigpen's EA, Sandra Timmons. Sandra's touch and help are evident in just about every part of the program this afternoon, including details that I forgot but she knew should be part of the event;

My former law clerk, Allegra Milholland. Allegra left me in January to go across the street to the Supreme Court, but she is always willing to answer my calls for her assistance whatever form that assistance may take;

And last, but certainly not least, the members of my chambers: my EA, Cathy Brown who was also here when Judge Hedrick served; my law clerks, Jennifer Sikes and Chris Karlsson; and my UNC externs, Ruth Sheehan and Andrew Arnold. Their assistance took many forms, including calming me down when the need arose!

Most of you probably know that our chambers consist of the judge, the judge's executive assistant, and two law clerks. I had been long gone from my stint here as one of Judge Hedrick's law clerks when Missy Donovan became his EA, but I heard all about her. Missy was with the Judge from 1991 until he retired at the end of 1992. She also worked in the Court's staff counsel's office, having been hired by the Judge for that position as well. We are honored to have her join us today for memories of working with the Judge as his last EA. Missy will also recognize other of the Judge's EAs who have joined us this afternoon.

As Chief Judge Martin indicated, I was fortunate to work for a year as one of Judge Hedrick's law clerks. Words are inadequate to describe that experience, but for decades I have pointed out that I learned more about the law during that one year with the Judge than in all three years I spent at UNC Law School. I also learned about living a good life, and I believe that all of the Judge's former law clerks will agree with me about that. We are delighted to have 12 of his clerks with us this afternoon. Based on the RSVPs I received, the following former clerks are here to celebrate this special event:

Cyndie Hagaman Callaway (and her son, Jacob)  
Cecil Harrison  
Lewis Sauls  
Billy Brewer  
Greg Lewis  
Julie Lewis  
Mark Finkelstein  
Robert Montgomery  
Don Watson  
Dona Lewandowski  
Hoppy Elliot  
Tricia Kerner Shields

I have one final thought I would like to share. For my reminiscences of the Judge at his funeral, I solicited descriptions of him from other clerks. Uniformly, he was described in terms such as larger than life, a huge personality, a character, a giant. The power of Judge Hedrick's personality has perhaps now been matched by the power

of the gift of his portrait to hang in this Courtroom. The first time I sat on a panel after his portrait was hung, I found myself glancing up for his reaction when one of the lawyers argued a dubious point, and I swear I saw the Judge nodding and smiling in agreement with my assessment.

### **REMARKS**

**by**

**CHIEF JUDGE JOHN MARTIN**

At our bimonthly Court Conference on April 19, the Court unanimously adopted a resolution which I would like to read:

### ***RESOLUTION***

#### **HONORING AND RECOGNIZING THE HEDRICK FAMILY FOR THEIR GENEROUS GIFT OF A PORTRAIT OF FORMER CHIEF JUDGE ROBERT HEDRICK**

**Whereas**, Robert Alfred “Fred” Hedrick was born in Statesville, North Carolina on 23 August 1922 and graduated from the Governor Morehead School for the Blind in 1943, from the University of North Carolina at Chapel Hill in 1946, and from its School of Law in 1949; and

**Whereas**, Judge Hedrick served as both a prosecutor and a judge in Iredell County, North Carolina from 1950 to 1969 when he was appointed to the North Carolina Court of Appeals by Governor Robert W. Scott; and

**Whereas**, Chief Judge Hedrick was then elected by the people of North Carolina to successive terms on this Court in 1970, 1976, and 1984 and served the people of this State on this Court for 24 years; and

**Whereas**, Chief Judge Hedrick served as Chief Judge of this Court from 3 January 1985 until his retirement on 31 December 1992; and

**Whereas**, Chief Judge Hedrick was well known not only for his love of the law, but also for his love of music and for his deep baritone voice, and he often sang at weddings and similar events and even sang once with his UNC classmate Andy Griffith before Griffith left North Carolina to pursue his acting career; and

**Whereas**, Chief Judge Hedrick was also known for his keen sense of humor and his devilish ability to play clever pranks on his unsuspecting colleagues and law clerks; and

**Whereas**, Chief Judge Hedrick was held in highest esteem by the Bench, Bar and citizenry of North Carolina for his life of public service and for the many examples of courage and perseverance demonstrated by his life;

**NOW, THEREFORE, BE IT RESOLVED BY THE NORTH CAROLINA COURT OF APPEALS:** that the North Carolina Court of Appeals hereby honors and recognizes with deep gratitude and appreciation the family of former Chief Judge Hedrick for their generous gift of his portrait, which shall be displayed with honor in the very courtroom where he contributed so much to the jurisprudence of this State, the elevation of his profession, and the collegiality of this Court.

**Adopted by the Chief Judge and Judges of  
The North Carolina Court of Appeals**

**On 19 April 2011**

Pat, we have had the resolution framed and I would like to come down and present it to you – it won't take the place of Fred's portrait in your house, but I hope it will be a constant reminder of the great esteem and love the Court holds for him.

We will adjourn now, and I hope that all of you who have not had an opportunity to see the portrait will go and have a look and then please join us for a reception in the gallery immediately outside the courtroom. I would ask that you not bring food or drink into the courtroom.

Marshal Ellis, adjourn the Court.

## **HEADNOTE INDEX**



## **WORD AND PHRASE INDEX**

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**ACCORD AND SATISFACTION**

**Written settlement agreement**—Plaintiff's pleading of accord and satisfaction to defendants' counterclaim could not act as a bar to his personal injury claim without the "written terms of a properly executed settlement agreement . . . [that] specifically stated that the acceptance of said settlement constitutes full settlement of all claims and causes of action arising out of the said motor vehicle collision or accident." N.C.G.S. § 1 540.2. **Hewett v. Weisser, 425.**

**Written settlement agreement**—The trial court erred in granting summary judgment in favor of defendants Robert and Bonnie Weisser on their counterclaim for property damage where plaintiff pled accord and satisfaction as a defense to the counterclaim because there was no evidence forecast of a written settlement agreement of all claims. **Hewett v. Weisser, 425.**

**ADMINISTRATIVE LAW**

**Judicial review of agency decision—arbitrary and capricious standard—substantive due process**—The trial court's decision upholding a Department of Health and Human Services' (DHHS) decertification of petitioner corporation as an HIV case management provider was not arbitrary or capricious. The evidence revealed that other HIV case management providers included in the record did not have problems similar to petitioner and petitioner had notice of the DHHS certification requirements. Further, petitioner was not denied substantive due process, and decertification would ensure that funds provided for public assistance would be protected. **Bradley-Reid Corp. v. N.C. Dep't of Health & Human Servs., 305.**

**Judicial review of agency decision—decertification of HIV case management services**—The trial court did not err by reversing an administrative law judge's determination that petitioner corporation's decertification as a provider of HIV case management services by the North Carolina Department of Health and Human Services (DHHS) was unjustified. Substantial evidence supported the trial court's findings of fact that the violations found by DHHS at the corporation were systemic. **Bradley-Reid Corp. v. N.C. Dep't of Health & Human Servs., 305.**

**APPEAL AND ERROR**

**Admission of evidence—no findings at suppression hearing—review de novo**—The trial court's legal determination that telephone records were admissible was reviewed *de novo* on appeal where neither party presented evidence pertaining to the suppression motion, no findings of fact were made, and defendant did not assign error to the trial court's failure to make findings. **State v. Stitt, 233.**

**Appealability—workers' compensation—attorney fee award—direct appeal—dismissed**—A workers' compensation issue was dismissed on appeal where the matter involved the reduction of an attorney fee award by the Industrial Commission, plaintiff appealed directly, and N.C.G.S. § 97 90(c) required appeal of the issue to the superior court. **Boylan v. Verizon Wireless, 81.**

**Failure to give proper notice of appeal—notice in open court prior to entry of final written order**—The Court of Appeals lacked jurisdiction to review a juvenile delinquency case because the juvenile's notice of appeal given in open court prior to the entry of the juvenile court's final written order was improper under N.C.G.S. § 7B 2602. **In re D.K.L., 443.**

## APPEAL AND ERROR—Continued

**General objection at trial—basis for objection—apparent from context—**The trial court's decision to admit a victim's testimony to an officer was reviewed on appeal where only a general objection was made by defendant and the trial court overruled the objection without stating grounds, but it was clear from the context that the objection was based on hearsay. **State v. Williams, 161.**

**Interlocutory order—failure to argue substantial right—**Plaintiffs' appeal from two interlocutory orders in a negligence and gross negligence case was dismissed because plaintiffs failed to advance any argument that the orders deprived them of a substantial right. **Waddell v. Metro. Sewerage Dist. of Buncombe Cnty., 586.**

**Interlocutory order—failure to show substantial right—**Plaintiffs' appeal from the trial court's interlocutory order dismissing their claims as to only the Euliss defendants and striking plaintiffs' notice of *lis pendens* only as to the Euliss defendants' property was dismissed because it did not dispose of all claims and defendants, and plaintiffs failed to demonstrate it affected a substantial right. **Ford v. Mann, 714.**

**Interlocutory order—partial summary judgment—substantial right—specific performance—**Although defendants' appeal from the grant of partial summary judgment was from an interlocutory order in a case arising out of defendants' exercise of an option to sell certain property, the order granting specific performance to plaintiff and requiring defendants to convey the property to plaintiff affected a substantial right and was thus subject to immediate review. **Phoenix Ltd. P'ship of Raleigh v. Simpson, 493.**

**Interlocutory order—substantial right—**The Lane Construction Corporation's appeal from the denial of its summary judgment motion, based on grounds that it was entitled to the protection of the exclusivity provisions of the Workers' Compensation Act, was dismissed as interlocutory where Lane failed to establish that its liability was inseparable from that of Rea Contracting such that the trial court's denial of summary judgment created a risk of inconsistent verdicts and affected a substantial right. **Van Dyke v. CMI Terex Corp., 437.**

**Interlocutory orders—absence of substantial right—no automatic appeal—**There is no automatic right of appeal under either N.C.G.S. §§ 1-277 or 7A-27(d) in the absence of a showing of a substantial right affected by the trial court's denial of defendant's motion for a new trial. In this case, the denial of defendants' motion for a new trial was only as to the liability phase of a bifurcated trial. **Land v. Land, 672.**

**Interlocutory orders—ex parte domestic violence protective order—**An *ex parte* domestic violence protective order (DVPO) was heard on appeal even though it was interlocutory where defendant waited until after a DVPO was entered to file notice of appeal to both the *ex parte* DVPO and the DVPO. **Hensey v. Hennessy, 56.**

**Interlocutory orders—order denying arbitration—substantial right not affected—**An appeal from an order denying a motion to compel arbitration was dismissed as interlocutory where the arbitration clause in a warranty agreement was permissive. Defendant would not be deprived of a substantial right absent immediate review. **Harbour Point Homeowners' Ass'n, Inc. v. DJF Enters., Inc., 720.**

**APPEAL AND ERROR—Continued**

**Interlocutory orders—partial summary judgment—different result from new trial—distinct from inconsistent verdicts**—Plaintiff was not entitled to appellate review of a partial summary judgment based on the possibility of inconsistent verdicts. A different result from a new trial granted after the current trial is distinct from the possibility of inconsistent verdicts in multiple trials. **Tands, Inc. v. Coastal Plains Realty, Inc.** 139.

**Interlocutory orders—partial summary judgment—intertwined with remaining issues**—An appeal from an interlocutory order was dismissed in an action involving default on a commercial real property lease where the court granted partial summary judgment for defendant on mitigation of damages, but the issues of overage rent and the amount of defendant's potential liability were "hopelessly intertwined" with the duty to mitigate and remained unresolved. **Tands, Inc. v. Coastal Plains Realty, Inc.**, 139.

**Interlocutory orders—substantial right—second jury on damages**—Defendants' appeal was from an interlocutory order where they had moved for a bifurcated trial on damages and then argued that they had a substantial right to have the same jury decide liability, compensatory damages, and punitive damages. While there will be some repetition of evidence, the second trial does not involve the same issues and there is no possibility of an inconsistent verdict. **Land v. Land**, 672.

**Jurisdiction of Court of Appeals—instruction issue not raised at trial or on appeal**—The Court of Appeals does not have the same broad remedial powers granted to the North Carolina Supreme Court, and had no jurisdictional authority to grant to appellants the same remedy granted in *Beaufort Cnty. Bd of Educ. v. Beaufort Cnty. Bd. of Comm'ns*, 363 N.C. 500. **Duplin Cnty. Bd. of Educ. v. Duplin Cnty. Bd. of Cnty. Comm'rs**, 113.

**Jurisdiction—satellite based monitoring determinations**—The Court of Appeals has jurisdiction to consider an appeal from satellite-based monitoring (SBM) determinations under N.C.G.S. § 14-208.40B pursuant to N.C.G.S. § 7A-27 because an SBM order is a final judgment from the superior court. **State v. Singleton**, 620.

**Motion to amend record on appeal—attachment of necessary documents**—The Court of Appeals did not sanction respondents for violations of the appellate rules since none of the violations were jurisdictional, nor did they rise to the level of being gross and substantial. Petitioner's motion to dismiss was deemed, in the alternative, to be a motion to amend the record on appeal to add the necessary attachments to the record on appeal. **Rinna v. Steven B.**, 532.

**Notice—sufficient**—The State's oral notice of appeal of the trial court's decision to grant defendant's motion to suppress complied with N.C. R. App. P. 4(a)(1). The notice was given in open court when the court reconvened five days after the conclusion of the pretrial suppression hearing. **State v. Williams**, 566.

**Plain error review—standard**—Plain error review requires that a different result probably would have been reached but for the error, a higher standard than a reasonable possibility of a different result without the evidence. **State v. Williams**, 161.

**APPEAL AND ERROR—Continued**

**Preservation of issues—argument not raised at trial—not considered—**An argument concerning the necessity of a subpoena to secure telephone records was not considered on appeal where it was not raised at trial. **State v. Stitt, 233.**

**Preservation of issues—constitutional issues—not raised at trial—**Defendants waived constitutional issues involving a juror with reservations about the law by not raising them at trial. **State v. Price, 153.**

**Preservation of issues—failure to argue—**The remaining assignment of error that defendant failed to argue was deemed abandoned under N.C. R. App. P. 28(b)(6). **State v. Sullivan, 540.**

**Preservation of issues—failure to renew motion to dismiss at close of all evidence—**Although defendant contends the trial court erred by failing to dismiss the charges against defendant based on the State's failure to produce evidence of defendant's willfulness, defendant did not preserve this issue for appellate review under N.C. R. App. P. 10(b)(3) because defendant failed to renew his motion at the close of all evidence. **State v. Sullivan, 540.**

**Preservation of issues—instructions—objection at trial—**The issue of a transferred intent instruction was preserved for appellate review where the State contended that defense counsel had objected to a different instruction, but it was clear from the record that the trial court was aware that defendant had objected to the transferred intent instruction and considered the two issues separately. **State v. Small, 331.**

**Preservation of issues—issue decided in prior case—**Our Court of Appeals has previously concluded that N.C.G.S. § 14-415.1, which prohibits the possession of firearms by convicted felons, does not violate the prohibition against *ex post facto* laws and is not an unconstitutional bill of attainder. **State v. Whitaker, 190.**

**Preservation of issues—statute inapplicable at time offenses committed—**Defendant's arguments regarding his probation or parole violation based upon N.C.G.S. §§ 15A-1022.1(c), -1340.16(a5), and (a6) were dismissed as none of these statutory subsections were in effect at the time defendant committed his offenses, and defendant failed to make any argument that the trial court erred under the proper statutes applicable to his offenses. **State v. Henderson, 381.**

**Right to counsel—motion to continue—failure to cite authority—no right to be represented by non-attorney—**Although defendant contends the trial court erred by denying his motion to continue so that he could obtain counsel, defendant abandoned this argument under N.C. R. App. P. 28(b)(6) by failing to cite any authority. Although defendant thereafter requested the trial court to recognize his son, a layman, as counsel, the Court of Appeals has previously rejected the assertion of a right to be represented by a non-attorney. **State v. Sullivan, 540.**

**Violation of appellate rules—previous reminders to follow rules—**Although defendant failed to follow a number of the appellate rules including, among others, N.C. R. App. P. 28(b)(5) and (b)(6) despite previous reminders to follow the appellate rules, the Court of Appeals considered his arguments since only the most egregious instances of nonjurisdictional default result in dismissal. **State v. Sullivan, 540.**

**ASSAULT**

**By strangulation—sufficiency of evidence—difficulty breathing not required**—Assault by strangulation does not require proof that the victim had difficulty breathing, and the evidence was sufficient where the victim stated that she felt that defendant was trying to crush her throat, that he put his weight on her neck with his foot, that she thought he was trying to make her unconscious, and that she thought she was going to die. **State v. Williams, 161.**

**Continuous transaction with multiple injuries—one assault**—Defendant should have been sentenced only for assault with a deadly weapon inflicting serious injury where the evidence established a continuous transaction with multiple injuries rather than multiple assaults. Assault inflicting serious bodily injury was the lesser offense and that judgment was vacated. **State v. Williams, 161.**

**Deadly weapon inflicting serious injury—sufficiency of evidence—use of hands as weapon**—The trial court did not err by denying defendant's motion to dismiss a charge of assault with a deadly weapon inflicting serious injury where there was sufficient evidence that defendant was the perpetrator and that he used his hands as a deadly weapon. **State v. Williams, 161.**

**Inflicting serious bodily injury—injuries sufficient**—There was sufficient evidence to deny defendant's motion to dismiss the charge of assault inflicting serious bodily injury where the victim sustained a puncture wound to the back of the scalp and a parietal scalp hematoma, and went into premature labor. **State v. Williams, 161.**

**Inflicting serious bodily injury—no substantial risk of death**—The trial court erred by denying defendant's motion to dismiss the charge of assault inflicting serious bodily injury where the victim received a vicious beating but was not placed at substantial risk of death and there was no evidence of extreme pain. **State v. Williams, 161.**

**Inflicting serious bodily injury—sufficiency of evidence**—The evidence of serious bodily injury was sufficient for the trial court to deny defendant's motion to dismiss the charge of assault inflicting serious bodily injury. **State v. Williams, 161.**

**Injuries caused by assault—sufficiency of evidence**—The trial court did not err by denying defendant's motion to dismiss a charge of assault inflicting serious bodily injury against this victim where defendant argued that there was insufficient evidence that the victim's injuries were caused by the assault. The nature of the injuries raised a reasonable inference that they were neither accidental nor self-inflicted, and the State was not required to exclude all other possible inferences as to their source. **State v. Williams, 161.**

**With a deadly weapon inflicting serious injury—defendant's hands**—The trial court did not err by denying a motion to dismiss the charge of assault with a deadly weapon inflicting serious injury where the victim was a small-framed, pregnant, cocaine-addicted woman whom defendant threw to a concrete floor with his hands, cracking open her head. He then put his hands around her neck. **State v. Williams, 161.**

**With deadly weapon on government official—instruction on lesser-included offense not given—plain error**—The trial court committed plain error in a prosecution for assault with a deadly weapon on a public official by not submit-

**ASSAULT—Continued**

ting to the jury the lesser-included offense of assault on a government official. Defendant struck an officer with her truck as the officer stood beside his patrol car, but there was a lack of significant injury to the officer or damage to the patrol car and a jury could conclude that the truck was not likely to produce death or great bodily harm under the circumstances of its use. **State v. Clark, 319.**

**ATTORNEYS**

**Professional negligence—summary judgment—insufficient evidence of proximate cause**—The trial court did not err by granting defendant attorney summary judgment on plaintiffs' claims for professional negligence, fraud, constructive fraud, and obstruction of justice because plaintiffs could not show that the affidavit at issue proximately caused plaintiffs any injury. **Self v. Yelton, 653.**

**Sanctions—filing motions in violation of court rules and for improper purpose**—The superior court did not err by ordering respondent attorney to pay \$500 as a sanction for filing motions in violation of court rules because respondent did not challenge any of the court's findings of fact that served as the bases for its decision to sanction him and conceded that the trial court had the inherent authority to sanction him. **In re Appeal of Small, 390.**

**BURGLARY AND UNLAWFUL BREAKING OR ENTERING**

**Motion to dismiss—evidence sufficient**—The trial court did not err in a prosecution for first-degree burglary and related offenses by denying defendant's motion to dismiss for insufficient evidence at the close of all the evidence. **State v. Williams, 103.**

**CHILD CUSTODY, SUPPORT, AND VISITATION**

**Petition filed under Hague Convention—verification requirement for petition—motion to dismiss**—The failure of the trial court to verify under N.C.G.S. § 50-308(a) a petition that was filed under the Hague Convention to return a minor child to Germany deprived the court of subject matter jurisdiction over that petition, and the order granting relief under the Hague Convention was vacated. The juvenile proceeding initiated by DSS remained pending because respondents had not yet obtained a ruling on their motion to dismiss the juvenile petition. **Rinna v. Steven B., 532.**

**Temporary custody order—best interest of the child**—The trial court did not err by modifying a temporary child custody order without finding that a substantial change of circumstances had occurred because the applicable standard of review for a temporary custody order is the best interest of the child. **Miller v. Miller, 577.**

**Temporary custody order—did not become permanent order**—A temporary child custody order did not become a permanent custody order by operation of law. Competent evidence supported the trial court's finding that the custody matter had not become dormant after the temporary order was entered. **Miller v. Miller, 577.**

**CIVIL PROCEDURE**

**New trial—invited error doctrine—rigorous trial schedule**—The trial court did not abuse its discretion in a medical malpractice case by granting plaintiff's

**CIVIL PROCEDURE—Continued**

motion for a new trial. The doctrine of invited error was inapplicable since plaintiff did nothing to induce the trial court to impose such a rigorous schedule, and the decision of whether the rigorous trial schedule compromised justice rested with the presiding trial judge who was able to personally observe the effects of the trial schedule upon the jurors. **Boykin v. Wilson Med. Ctr.**, 559.

**Summary judgment—genuine issue of material fact**—Even if the trial court reached the merits of Lane's appeal, the trial court did not err in denying's Lane's motion for summary judgment as there is a genuine issue of material fact as to whether Lane's allegedly negligent actions were taken in its own interests or in the course of conducting Rea's business. **Van Dyke v. CMI Terex Corp.**, 437.

**CONFESSIONS AND INCRIMINATING STATEMENTS**

**Custody—failure to advise of *Miranda* rights**—The trial court did not err by suppressing defendant's statements to a detective because defendant was in custody and subjected to interrogation without advisement of his *Miranda* rights at the time he made the statements when the conversation did not remain in the nature of general conversation, but instead moved to defendant's cooperation with the investigation and to comments which were reasonably likely to elicit an incriminating response. **State v. Hensley**, 607.

**CONSTITUTIONAL LAW**

**Confrontation clause—admission of hearsay—no prejudice**—Even if defendant had properly asserted plain error in contending that the confrontation clause was violated in the admission of hearsay statements from the victim, it cannot be said that the error affected the result of the trial with respect to this charge. **State v. Williams**, 161.

**Double jeopardy—assault and first-degree kidnapping**—There was no double jeopardy violation in sentencing defendant separately for felonious assault and first-degree kidnapping where defendant argued that the assault was used to elevate second-degree kidnapping to first-degree kidnapping. Although the kidnapping instruction required a finding of abduction for the "purpose" of doing serious bodily injury, that is distinct from the actual commission of serious bodily injury required for assault inflicting serious bodily injury. **State v. Williams**, 161.

**Double jeopardy—assault inflicting serious injury—assault by strangulation**—Although not raised at trial, the issue of double jeopardy was reviewed under Rule 2 of the Rules of Appellate Procedure where defendant was sentenced for both assault inflicting serious injury and assault by strangulation. Language in N.C.G.S. § 14-32.4(b) indicates that the Legislature intended that a defendant be sentenced only for the higher of the offenses, assault inflicting serious bodily injury, and the case was remanded for resentencing. **State v. Williams**, 161.

**Double jeopardy—assault with a deadly weapon inflicting serious injury—assault inflicting serious bodily injury**—Defendant should not have been sentenced for both assault with a deadly weapon inflicting serious injury and assault inflicting serious bodily injury, and the later judgment was vacated. **State v. Williams**, 161.

## CONSTITUTIONAL LAW—Continued

**Double jeopardy—basis of first-degree kidnapping**—There was no double jeopardy violation where defendant argued that second-degree kidnapping was elevated to first-degree kidnapping by a first-degree sexual offense against this victim, for which he was also sentenced. The jury was instructed on first-degree kidnapping based on a serious injury without reference to the sexual assault. **State v. Williams, 161.**

**Double jeopardy—separate counts—contemporaneous penetration**—There was no double jeopardy violation where the trial court denied defendant's motion to dismiss one count of first-degree sexual offense where the victim regained consciousness to find defendant's hands in her vagina and rectum. Each act is a separate offense; the occurrence of the acts in a single transaction is irrelevant. **State v. Williams, 161.**

**Due process—notice—opportunity to be heard**—The administrative law judge (ALJ) did not violate petitioner's right to due process in a state employee termination case where the judge granted summary judgment for respondent and petitioner contended that she was denied notice of the basis for the motion and the opportunity to be heard. Petitioner did not explain how the ALJ's recitation of the statutory standard for summary judgment could be construed as a new argument. **Woodard v. N.C. Dep't of Transp., 124.**

**Due process—notice**—The Court of Appeals exercised its discretion under N.C. R. App. P. 2 and concluded that respondent attorney's due process rights were not violated where respondent was put on notice that sanctions may be imposed for filing his motions to recuse and continue, had notice of the grounds upon which those sanctions were imposed against him, and had an opportunity to address those grounds throughout the entire hearing on defendant's motions. **In re Appeal of Small, 390.**

**Effective assistance of counsel—failure to object—failure to show different outcome**—Although defendant contends he was denied effective assistance of counsel in a drug case based on defense counsel's failure to challenge the admissibility of a lab report, defendant failed to meet his burden of showing that the outcome of his trial would have been different. **State v. Steele, 689.**

**Encounter not a seizure—erroneous suppression of evidence**—The trial court committed reversible error in granting defendant's motion to suppress cocaine found on his person. Because the encounter between the police officer and defendant did not constitute a "seizure," the encounter did not implicate the Fourth Amendment prohibition against unreasonable searches and seizures. The order of the trial court was reversed. **State v. Williams, 566.**

**Fourth Amendment standing—mere possession of property**—A first-degree murder defendant did not have standing to assert Fourth Amendment violations in the admission of cellular telephone records where the telephones found in defendant's possession were owned by one of the victims. Neither ownership nor a possessory interest will be assumed from mere possession. **State v. Stitt, 233.**

**Motor vehicle checkpoint**—In evaluating the constitutionality of a motor vehicle checkpoint, a court considers the primary programmatic purpose of a checkpoint and, if the purpose is valid, the reasonableness of the checkpoint, as determined by weighing the factors set forth in *Brown v. Texas*, 433 U.S. 47. **State v. Veazey, 398.**

**CONSTITUTIONAL LAW—Continued**

**Motor vehicle checkpoint—primary programmatic purpose**—The trial court's conclusions that the primary programmatic purpose of the checkpoint was the enforcement of the State's motor vehicle law, that this purpose was lawful, and that the checkpoint was tailored to fit this purpose were supported by the findings. **State v. Veazey, 398.**

**Motor vehicle checkpoint—reasonableness**—The trial court's findings of fact and conclusions of law indicate that the trial court considered the factors set forth in *Brown* in concluding that the checkpoint was not unreasonable and therefore valid under the Fourth Amendment to the Constitution. **State v. Veazey, 398.**

**Recovery of Medicaid payments—no federal right—no property interest**—The trial court did not err by concluding that plaintiffs had neither a constitutional nor a contractual cause of action in a case arising from the State's attempt to recover from providers Medicaid amounts which had been billed to and paid by the State, but which were eligible for payment by Medicare. The providers had neither a federal right nor a property interest. **Charlotte Mecklenburg Hosp. Auth. v. N.C. Dep't of Health & Human Servs., 70.**

**Right to confrontation—waiver**—The trial court did not err in a trafficking in cocaine by possession case by admitting into evidence a laboratory report that identified the recovered substance as cocaine without having the lab analyst who performed the tests testify because (1) the State introduced the lab report at trial under N.C.G.S. § 90-95(g); and (2) defendant waived his right to confrontation by failing to object to the report at trial. **State v. Steele, 689.**

**Right to counsel—motion to continue—failure to cite authority—no right to be represented by non-attorney**—Although defendant contends the trial court erred by denying his motion to continue so that he could obtain counsel, defendant abandoned this argument under N.C. R. App. P. 28(b)(6) by failing to cite any authority. Although defendant thereafter requested the trial court to recognize his son, a layman, as counsel, the Court of Appeals has previously rejected the assertion of a right to be represented by a non-attorney. **State v. Sullivan, 540.**

**Right to unanimous jury—investigation of individual juror denied**—Even if defendant had properly preserved the issue for appeal, the trial court did not abuse its discretion by deciding against conducting an investigation with an individual juror who expressed a reluctance to follow the law after deliberations began. Such an action would have resulted in a violation of defendant's right to a unanimous jury. **State v. Price, 153.**

**Robbery—evidence sufficient—taking back money from prostitutes**—The trial court did not err by denying defendant's motion to dismiss a charge of common law robbery against one of several victims where there was substantial evidence of a taking, of force, and of defendant as perpetrator. Defendant's interactions with this and other victims clearly indicate that he intended to rob the victims and take back the money he had given them for sex. **State v. Williams, 161.**

**Speedy trial—record ambiguous**—The question of whether defendant was denied a speedy trial was remanded for an evidentiary hearing where the record was insufficient both on whether the issue was properly presented at trial and whether the factors in *Barker v. Wingo*, 407 U.S. 514, were satisfied. **State v. Clark, 319.**

**CONSTITUTIONAL LAW—Continued**

**Statute—constitutionality on face and as applied**—Although defendant county commissioners contended that the statute which authorized plaintiff school board's suit regarding the budget was unconstitutional on its face or as applied, defendant conceded that the decision in *Beaufort Cnty. Bd. of Educ. v. Beaufort Cnty. Bd. of Comm'ns*, 363 N.C. 500, was determinative and resolved the issues in favor of plaintiff. **Duplin Cnty. Bd. of Educ. v. Duplin Cnty. Bd. of Cnty. Comm'rs**, 113.

**CONTRACTS**

**Breach—waiver of time is of the essence clause**—The trial court did not err by granting summary judgment in favor of plaintiff based on its conclusion that defendants had, as a matter of law, waived the time is of the essence clause in a case arising out of defendants' exercise of an option to sell certain property. **Phoenix Ltd. P'ship of Raleigh v. Simpson**, 493.

**CRIMINAL LAW**

**Allen charge—additional language**—The trial court did not err when giving an *Allen* charge by instructing the jury that it was their duty to do whatever they could to reach a verdict. **State v. Price**, 153.

**Entrapment—not established as a matter of law**—The trial court correctly denied defendant's motion to dismiss a narcotics prosecution based on the defense of entrapment, and properly submitted the issue to the jury, where defendant agreed to sell the drugs the same day that she encountered the confidential informant at a treatment clinic, there was no series of meetings or ensuing bonding conversations, and defendant had already taken a drug the day before and cannot argue that she was induced back into her drug habit with the promise of tablets. The undisputed testimony and required inferences did not compel a finding that defendant was induced to commit an act which she was not predisposed to commit. **State v. Beam**, 643.

**Flight—evidence sufficient**—There was sufficient evidence for an instruction on flight after two murders and robberies where defendant claimed that traveling to New York was his standard practice but he varied his normal behavior in this case. Other reasonable explanations for defendant's conduct do not render the instruction improper; flight is merely evidence of guilt, not a presumption. **State v. Stitt**, 233.

**Jury instructions—duress—insufficient evidence**—The trial court did not err in a prosecution for, *inter alia*, first degree kidnapping and robbery with a dangerous weapon by refusing to instruct the jury on the defense of duress. Defendant's testimony did not show that his actions were caused by a reasonable fear that he would suffer immediate death or serious bodily injury if he did not so act. **State v. Sanders**, 631.

**Jury instructions—failure to use requested instruction**—The trial court did not err by failing to use defendant's definition of "willfully" in its instructions to the jury because the court's instruction was consistent with the definition provided by our Supreme Court. **State v. Sullivan**, 540.

**Motion for mistrial denied—evidence of polygraph examination nonprejudicial**—The trial court in a prosecution for first-degree kidnapping, robbery with a dangerous weapon, first-degree sexual offense, and murder did not abuse

**CRIMINAL LAW—Continued**

its discretion by denying defendant's motion for a mistrial. Although the Court of Appeals disapproved of the State submitting to the jury exhibits containing references to a polygraph examination administered to a witness, admission of the exhibits was not prejudicial error as the exhibits did not contain evidence of the results of the polygraph examination. **State v. Sanders, 631.**

**Prosecutor's closing argument—intervention not required**—The trial court in a prosecution for first-degree kidnapping, robbery with a dangerous weapon, first-degree sexual offense, and murder did not err by failing to intervene *ex mero motu* during the prosecutor's closing arguments because the prosecutor's comments were not so grossly improper as to require the trial court's intervention. **State v. Sanders, 631.**

**Prosecutor's closing argument—statements about defendant**—The trial court did not err by failing to intervene in the State's closing argument where defendant contended that the State had encouraged the jury to convict on an impermissible basis, but in fact mischaracterized the State's argument. **State v. Williams, 103.**

**Prosecutor's closing argument—trial court's instruction—prejudice cured**—The trial court in a first-degree kidnapping, robbery with a dangerous weapon, first-degree sexual offense, and murder prosecution did not abuse its discretion by overruling defendant's objection to the prosecutor's characterization of the law made during closing arguments. The trial court's subsequent instruction cured any prejudice from the prosecutor's comments. **State v. Sanders, 631.**

**Restitution—insufficient evidence**—The trial court erred in ordering defendant to pay restitution in the amount of \$228,043.84 for convictions of misdemeanor hit and run and driving while license revoked. Defendant did not agree or stipulate to the amount of restitution and the evidence adduced at trial was insufficient to justify the amount of restitution. **State v. Mumford, 594.**

**DISCOVERY**

**Victim's undisclosed statement to prosecutors—no new information**—The trial court did not abuse its discretion by denying defendant's motion to dismiss or exclude a victim's statement to prosecutors where that statement was not disclosed to defendant. There was nothing significantly new or different in the undisclosed statement; the only difference from the other, disclosed information was that the victim could not remember speaking to officers on the night of the shooting. **State v. Small, 331.**

**Violations—untimely disclosure of statement—recess instead of dismissal of charges or barring statement—abuse of discretion standard**—The trial court did not abuse its discretion in a prosecution for multiple counts of breaking or entering a motor vehicle and larceny case by granting a recess instead of imposing sanctions even though the court concluded the State had committed a discovery violation. The trial court's statement upon making its ruling demonstrated that it considered any possible prejudice to defendant, the various possibilities as to remedies, and that it was open to consider additional requests from defendant. **State v. Remley, 146.**

**DOMESTIC VIOLENCE**

**Basis of protective order—memory of separate proceeding—sufficiency—**There was no competent evidence to support the issuing of a domestic violence protective order where the trial court relied on its memory of a separate proceeding. Furthermore, judicial notice was not appropriate for factual issues such as those presented here. **Hensey v. Hennessy, 56.**

**Ex parte order—findings and conclusions—sufficiently supported—**The findings and conclusions in an *ex parte* domestic violence protective order were supported by the allegations of the verified complaint and the recency and severity of defendant's acts. **Hensey v. Hennessy, 56.**

**Ex parte protective order—findings—incorporation of complaint—***Ex parte* domestic violence protective orders need not contain findings and conclusions that fully satisfy the requirements of N.C.G.S. § 1A-1, Rule 52, but it was still necessary to consider whether the order in this case was sufficient since the court simply incorporated the allegations of the complaint. While it would be preferable for the court to set forth specific facts, this order, read with the complaint, provides sufficient information for appellate review. **Hensey v. Hennessy, 56.**

**Protective order—ex parte hearing—evidence—**It was presumed that the facts as found in an *ex parte* domestic violence protective order were supported by competent evidence where the record reflected that a hearing was held and plaintiff appeared, presumably offering evidence. **Hensey v. Hennessy, 56.**

**DRUGS**

**Trafficking 28 grams—sufficiency of evidence—prescription bottles—**The trial court correctly denied defendant's motion to dismiss charges of trafficking in 28 grams of an opium derivative where the tablets were found in prescription bottles. The prescription labels were nearly a year old and defendant offered no evidence that she had not taken any of the tablets. Taken in the light most favorable to the State, the evidence did not establish that defendant was entitled to the statutory exemption from prosecution; the trial court correctly submitted to the jury the issue of whether defendant was authorized to possess the tablets. **State v. Beam, 643.**

**Trafficking by delivery—actual delivery not required—**An attempted delivery of a controlled substance satisfied the statutory definition of delivery. Actual delivery was not required. **State v. Beam, 643.**

**Trafficking in cocaine by possession—motion to dismiss—sufficiency of evidence—constructive possession—**The trial court did not err by denying defendant's motion to dismiss the charge of trafficking in cocaine by possession based on constructive possession and other incriminating evidence including that defendant fled when approached by police officers and he admitted the two packages of cocaine belonged to him. **State v. Steele, 689.**

**ENVIRONMENTAL LAW**

**Land—disturbing activities—development of golf course—pollution control act—**The General Assembly intended N.C.G.S. § 113A-57(1) to be a land disturbing activity regulation statute and environmental pollution control act aimed at controlling or preventing the flow of sediment into the fresh waters of North Carolina. The protection of trout populations and habitat must be primary objectives and concerns in reaching any final resolution when granting a variance

**ENVIRONMENTAL LAW—Continued**

allowing temporary and minimal land disturbing activities within a trout waters buffer zone. **Hensley v. N.C. Dep't of Env't & Natural Res., 1.**

**Trout waters buffer zone—sedimentation—land—disturbing activities—development of golf course**—The trial court erred by concluding that Mountain Air's land-disturbing activities in the construction of a country club in a trout waters buffer zone were "temporary" and "minimal" and thus authorized by N.C.G.S. § 113A-57(1). Mountain Air would continue to conduct activity in the trout waters buffer zone after completion of all construction. **Hensley v. N.C. Dep't of Env't & Natural Res., 1.**

**EVIDENCE**

**Constructive possession—borrowed vehicle—totality of circumstances**—The trial court did not err by failing to dismiss all charges, including possession of a firearm by a felon, possession of a schedule II controlled substance, possession of marijuana, possession of drug paraphernalia, and carrying a concealed weapon, based on alleged insufficient evidence because the totality of the circumstances revealed that a reasonable jury could conclude that defendant constructively possessed the contraband in the carry bag of a borrowed motorcycle. **State v. Fortney, 662.**

**Driving while intoxicated—consecutively administered tests**—Because two of four attempted Intoxilyzer tests met the "consecutively administered tests" requirement under N.C.G.S. § 20-139.1(b3) (2005), the trial court did not err in admitting into evidence the lower of the two valid readings. **State v. Shockley, 431.**

**Driving while intoxicated—consecutively administered tests**—Two Intoxilyzer tests conducted within 11 minutes of each other were "consecutively administered tests" where defendant's failure to properly blow into the machine resulted in an intervening invalid reading. **State v. Shockley, 431.**

**Expert testimony—chemical analyst—results of NarTest machine—reliability**—The trial court abused its discretion in a possession of cocaine and possession of drug paraphernalia case by allowing an officer to testify as an expert chemical analyst and in admitting evidence of results from a NarTest machine because it was not an accepted method of analyses or identification of controlled substances. Controlled substances defined by their chemical composition can only be identified through the use of chemical analysis and not through lay testimony based on visual inspection. **State v. Meadows, 707.**

**Hearsay—other evidence—same effect**—There was no prejudice from the admission of hearsay statements by a victim to an officer concerning missing money where other evidence provided sufficient evidence of a taking. **State v. Williams, 161.**

**Lay opinion testimony**—Because the testifying police officer was in no better position than the jury to identify defendant as the person depicted in the surveillance video, the trial court erred by admitting the officer's lay opinion testimony. **State v. Belk, 412.**

**Lay opinion testimony**—There was no rational basis for the trial court to conclude that the police officer was more likely than the jury correctly to identify defendant as the individual depicted in the surveillance video where the officer's familiarity with defendant's appearance was based solely on three brief encoun-

**EVIDENCE—Continued**

ters with defendant and there was no evidence that defendant had altered his appearance prior to trial, that the individual depicted in the surveillance video had disguised his appearance at the time of the offense, that the individual's face or other features were obscured in the video or blocked by any item of clothing, or that the surveillance video viewed by the jury was unclear or blurred. **State v. Belk, 412.**

**Motor vehicle checkpoint—motion to suppress—resolution of conflicting evidence**—The trial court's findings of fact in its order denying defendant's motion to suppress evidence obtained at a motor vehicle checkpoint were supported by competent evidence because it is for the trial court to resolve conflicts in the evidence and such resolution will not be disturbed on appeal. **State v. Veazey, 398.**

**Officer's report—waiver of objection—defendant requested second reading of report**—Defendant lost the benefit of his objection to a detective reading to the jury a report of her 9 December 2005 interview with the minor victim in a multiple statutory rape, multiple statutory sex offense, and sex offense in a parental role case based on defense counsel's request of a second reading of the report. **State v. Smith, 681.**

**Plain error**—The admission of testimony regarding defendant's refusal to give a subsequent breath sample, though possibly erroneous on relevancy grounds, did not rise to the level of plain error. **State v. Shockley, 431.**

**Photographs of crime scene—admissible**—Four photographs of first-degree murder victims at the crime scene were properly admitted where the photos showed different perspectives on the crime scene, focused on different pieces of evidence, twenty-three other photographs were admitted without objection, and the photos were used for illustrative purposes only and not to inflame the jury. **State v. Stitt, 233.**

**Prejudicial error**—As the jury was likely to give significant weight to the officer's testimony and the State's case rested exclusively on the surveillance video and the officer's identification of defendant in the video, the trial court committed prejudicial error by allowing into evidence the officer's identification testimony. **State v. Belk, 412.**

**Prior felony conviction—rejection of defendant's stipulation—not unfairly prejudicial**—The trial court did not abuse its discretion in a prosecution for possession of a firearm by a felon, carrying a concealed weapon, and narcotics offenses by allowing evidence of defendant's specific prior felony conviction even though he had offered to stipulate that he had a prior felony. **State v. Fortney, 662.**

**Report—testimony about sexual conduct—failure to provide limiting instruction—plain error analysis**—Even assuming *arguendo* that it was error for the trial court to fail to give a limiting instruction regarding the minor victim's testimony regarding sexual conduct in Florida, there was no plain error given the overwhelming evidence of defendant's guilt of each offense charged including defendant's own admissions of the sexual contact and the fact he fathered the minor victim's child and a second baby that was aborted. **State v. Smith, 681.**

**EVIDENCE—Continued**

**Telephone records—federal violations in obtaining—no suppression remedy**—Even if the State violated the federal Stored Communications Act in obtaining telephone records in a first-degree murder prosecution, there is no suppression remedy under federal law. **State v. Stitt, 233.**

**FIREARMS AND OTHER WEAPONS**

**Discharge into occupied building**—Although defendant contended that inclusion of a transferred intent instruction was error in a prosecution for assault and discharging a firearm into occupied property, the instructions accurately conveyed the elements of the offense and comported with the evidence. Defendant intentionally fired a shotgun at the victim, hitting both the victim and a house defendant knew to be occupied. **State v. Small, 331.**

**Discharge into occupied property—muzzle velocity**—The trial court did not err by failing to dismiss the charge of discharging a firearm into occupied property for insufficient evidence that the shotgun met the velocity requirements of N.C.G.S. § 14-34.1(a). There are two categories of weapons covered by the statute: firearms and other barreled weapons. The plain language of the statute, legislative intent, and precedent indicate that the minimum muzzle velocity requirement applies to “other barreled weapons” and not to firearms in general. **State v. Small, 331.**

**Possession of firearm by felon—constitutionality—preservation of public peace and safety**—N.C.G.S. § 14-415.1, which prohibits the possession of firearms by convicted felons, was constitutional as applied to defendant because it was a reasonable regulation that prohibited a convicted felon who violated the law on numerous occasions from possessing firearms in order to preserve public peace and safety. **State v. Whitaker, 190.**

**FRAUD**

**Constructive—insufficient evidence of benefit**—The trial court did not err in granting summary judgment in favor of defendant attorney on plaintiffs’ claim for constructive fraud because plaintiffs failed to present sufficient evidence that defendant sought to benefit himself in the transaction. **Self v. Yelton, 653.**

**HOMICIDE**

**First-degree murder—premeditation and deliberation—sufficiency of evidence**—There was sufficient evidence of premeditation and deliberation, and the court correctly denied defendant’s motion to dismiss a first-degree murder charge, where the evidence showed a time for reflection during which defendant decided to return to the victims’ home, and that this victim was shot twice at close range, which required multiple trigger pulls. **State v. Stitt, 233.**

**First-degree murder—voluntary manslaughter instruction—not given**—The trial court did not err by refusing to instruct the jury on voluntary manslaughter in a first-degree murder prosecution where defendant relied on precedent involving provocation and a disposition that did not cool. Here, there was a time lapse between defendant’s argument with the victims and the shootings and testimony that defendant shot this victim because she was screaming and not because of the prior altercation. **State v. Stitt, 233.**

**HOMICIDE—Continued**

**Second-degree murder—deadly weapon—heat of passion**—The trial court did not err by denying defendant's motion to dismiss a second-degree murder charge where defendant used a deadly weapon but there was some evidence of heat of passion. That evidence converts the presumption of malice raised by the use of a deadly weapon to a permissible inference and does not mean that the State failed to present sufficient evidence of second-degree murder. **State v. Stitt, 233.**

**IDENTIFICATION OF DEFENDANTS**

**Photographic line-up—defendant acquitted**—A photographic line-up was not too suggestive where defendant was acquitted of the only charge related to the evidence. **State v. Williams, 103.**

**Show-up—private citizen initiating**—The trial court did not err in a prosecution for burglary and related charges by admitting identification testimony from a "show-up" where a friend acting as a private citizen called the witness to see defendant. **State v. Williams, 103.**

**INDIANS**

**Federal Indian gaming law—preferential gaming rights**—The trial court erred in a declaratory judgment action by granting judgment in favor of plaintiffs on their claim that the State is not permitted under federal Indian gaming law to grant the Eastern Band of Cherokee Indians of North Carolina exclusive rights to conduct certain gaming on tribal land while prohibiting it throughout the rest of the State. N.C.G.S. § 71A-8 reflects a policy decision by the General Assembly to extend preferential gaming rights in deference to a separate sovereign entity residing within its borders. **McCracken & Amick, Inc. v. Perdue, 480.**

**INDICTMENT AND INFORMATION**

**Short-form indictment—sufficient—first-degree murder**—A short-form indictment notified defendant that he was being charged with first-degree murder and set out the requisite elements pursuant to N.C.G.S. § 15-144. Specifically alleging premeditation and deliberation is not required. **State v. Stitt, 233.**

**Variance with evidence—method of strangulation**—The trial court correctly denied defendant's motion to dismiss a charge of assault by strangulation where defendant contended that there was a fatal variance between the indictment and the testimony in the method of strangulation. There was testimony that indicated no variance; even so, the method of strangulation was surplusage. **State v. Williams, 161.**

**INJUNCTIONS**

**First judge recused—modification by second judge**—A second judge did not err by modifying a preliminary injunction where the first judge recused himself after entry of the injunction and could not have revisited the ruling. The second judge stepped into the shoes of the first and could, in his discretion, rule on the injunction without a change of circumstances. Moreover, a comprehensive New York action involved a change of circumstances sufficient to support modification. **Wachovia Bank v. Harbinger Capital Partners Master Fund I, Ltd., 507.**

**INJUNCTIONS—Continued**

**Preliminary—modification—standard of review**—Where a modification of a preliminary injunction dissolved certain aspects of the injunction and maintained others, the standard of review was abuse of discretion rather than *de novo*. **Wachovia Bank v. Harbinger Capital Partners Master Fund I, Ltd.**, 507.

**JUDGMENTS**

**Exempt status of IRA—withdrawn IRA funds**—The trial court erred by requiring defendant to place funds withdrawn from his IRAs in the future into escrow or other trust pending a determination by the trial court as to whether those funds remained exempt from plaintiff's judgment against defendant for \$567,000 in compensatory and punitive damages. N.C.G.S. § 1C-1601(a)(9) exempts defendant's IRAs and defendant's legal use of funds contained within those IRAs from plaintiff's judgment. **Kinlaw v. Harris**, 252.

**JURISDICTION**

**Concurrent—superior and district court—prior valid order binding**—The superior court erred in a trust pursuit claim by ordering the transfer of assets from a limited liability corporation to a trust where there was a prior valid order entered in an equitable distribution proceeding in the district court which prohibited such transfers. **Keith v. Wallerich**, 550.

**Subject matter—North Carolina State Bar's fee dispute resolution program**—In an action filed to recover attorney fees for plaintiff's representation of defendant in an equitable distribution litigation, plaintiff's reliance on *Baars v. Campbell University* and Comment [7] of Rule 0.2 of the Rules of Professional Conduct was misplaced as defendant did not seek to hold plaintiff liable for an alleged violation of the Rules but, instead, attempted to use plaintiff's noncompliance with the State Bar's rules as a jurisdictional defense to plaintiff's claim. **Cunningham v. Selman**, 270.

**Subject matter—North Carolina State Bar's fee dispute resolution program—conclusion**—The undisputed evidence in this case shows that plaintiff prematurely and unilaterally ended his participation in the State Bar's fee dispute resolution program and brought suit against defendant, a decision which will not be countenanced. **Cunningham v. Selman**, 270.

**Subject matter—North Carolina State Bar's fee dispute resolution program**—The trial court did not err in dismissing for lack of subject matter jurisdiction plaintiff's civil action to recover unpaid attorney fees from defendant. The State Bar's fee dispute resolution rules are jurisdictional and mandatory; the basic principle that one must comply with a valid administrative scheme before seeking redress in the courts is applicable. In this case, mediation of the fee dispute was still pending because the State Bar mediator had not declared an impasse and no written settlement agreement had been executed by the parties. **Cunningham v. Selman**, 270.

**Subject matter—North Carolina State Bar's fee dispute resolution program—waiver of rules**—By terminating the fee dispute resolution process and notifying the Grievance Committee of plaintiff's conduct, the State Bar did not "waive" its fee dispute resolution rules, thereby allowing plaintiff's civil action to

**JURISDICTION—Continued**

move forward, as this would render meaningless the State Bar's rules and any resulting jurisdictional limitations on the power of the courts to hear and decide such cases. **Cunningham v. Selman, 270.**

**Subject matter—order to dismiss**—The trial court dismissed plaintiff's complaint seeking recovery of attorney fees for his representation of defendant in an equitable distribution litigation because plaintiff's failure to comply with the State Bar's fee dispute resolution rules deprived the trial court of jurisdiction over the subject matter of plaintiff's complaint. The trial court's dismissal of plaintiff's complaint was not a sanction for plaintiff's violation of the State Bar's fee dispute resolution rules and plaintiff will not have been sanctioned twice for the same conduct if the State Bar ultimately imposes sanctions. **Cunningham v. Selman, 270.**

**Subject matter—trust pursuit claim**—The superior court had subject matter jurisdiction to hear a trust pursuit claim where the clerk of superior court had original jurisdiction over the claim and had statutory authority to transfer the claim to the superior court. The clerk of superior court had original jurisdiction over the claim as it concerned the internal affairs of a trust. **Keith v. Wallerich, 550.**

**KIDNAPPING**

**First-degree—basis—assault by strangulation**—There was no double jeopardy violation in the elevation of kidnapping to first-degree kidnapping where a conviction for felonious assault was reversed but assault by strangulation remained. Assault by strangulation is clearly distinct from first-degree kidnapping. **State v. Williams, 161.**

**First-degree—elevation from second-degree—basis**—There was no error in the elevation of second-degree kidnapping to first-degree kidnapping where defendant contended that a first-degree sexual offense should not have been used for that purpose. There was no reference to sexual assault in the jury instructions. **State v. Williams, 161.**

**First-degree—evidence of removal—sufficient**—The trial court did not err by denying defendant's motion to dismiss charges of first-degree kidnapping where defendant contended that there was insufficient evidence of removal for the purpose of serious bodily injury. The State's evidence was sufficient to show that defendant induced the victim into his car on the pretext of paying her for a sexual act while his intent was to assault her. **State v. Williams, 161.**

**First-degree—purpose of serious bodily harm—actual injury merely serious**—Defendant's contention that a charge of first-degree kidnapping involving one of several victims should have been dismissed was properly denied, because *inter alia*, there was substantial evidence that defendant's purpose in kidnapping this victim was to do her serious bodily harm, even if he only inflicted serious injury. **State v. Williams, 161.**

**First-degree—sufficiency of evidence—removal—separate from other crimes**—The trial court correctly denied defendant's motion to dismiss a charge of first-degree kidnapping against one of several victims where defendant had paid the victim for a sexual act and then assaulted her. A reasonable mind could easily conclude that taking the victim to a secluded area was a separate transaction designed to reduce his risk of discovery. **State v. Williams, 161.**

**LACHES**

**Failure to show change in condition or relations—failure to show prejudice**—The trial court did not err by dismissing defendants' affirmative defense of laches in a case arising out of defendants' exercise of an option to sell certain property. *Phoenix Ltd. P'ship of Raleigh v. Simpson*, 493.

**MENTAL ILLNESS**

**Finding that condition would deteriorate and could likely become dangerous—psychiatric history**—The trial court did not err by finding that respondent's condition would deteriorate and that he could likely become dangerous because Dr. Godfrey's testimony, in conjunction with respondent's own testimony, provided sufficient support for the trial court's determination under N.C.G.S. § 122C-263(d)(1)(c). Under N.C.G.S. § 122C-263(d)(1)(c), the State was only required to prove that respondent was in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness as defined by N.C.G.S. § 122C-3(11). *In re Webber*, 212.

**Outpatient commitment—clear, cogent, and convincing evidence**—The trial court did not err by its findings of fact under N.C.G.S. § 122C-263(d)(1)(c) regarding whether, without treatment, respondent's psychiatric condition would deteriorate and predictably result in dangerousness because the trial court's handwritten findings of fact combined with Dr. Godfrey's incorporated report provided sufficient detail to meet the statutory requirements and to permit appellate review. *In re Webber*, 212.

**Recommitment orders—impermissible collateral attack on prior order**—Respondent was not able to undo subsequent recommitments by challenging the prior final order that he did not appeal. Respondent's appeal from the present commitment order was an impermissible collateral attack on the prior order. Respondent was required to appeal the prior order under N.C.G.S. § 122C-272 or request a supplemental hearing under N.C.G.S. § 122C-274(e). The trial judge thus had the authority to order his recommitment. *In re Webber*, 212.

**MOTOR VEHICLES**

**Driving while impaired—felony serious injury by vehicle—conviction inconsistent**—The trial court erred in denying defendant's motion to set aside the jury's convictions on five counts of felony serious injury by vehicle where the jury's "not guilty" verdict on a driving while impaired charge negated an essential element necessary to support a conviction of felony serious injury by vehicle. The jury outcome was logically inconsistent and legally contradictory as the elements of felony driving while impaired causing serious injury statutorily require conviction of driving while impaired. *State v. Mumford*, 594.

**Driving while impaired—felony serious injury by vehicle—sufficient evidence**—The trial court did not err in denying defendant's motion to dismiss charges of felony serious injury by vehicle because the State presented sufficient evidence that defendant was driving while impaired at the time of the incident in question. *State v. Mumford*, 594.

**Driving while impaired—probable cause—totality of circumstances**—The trial court did not err in a driving while impaired case by concluding as a matter of law that probable cause existed for petitioner's arrest based on the nature of petitioner's single car accident and the smell of alcohol. *Steinkrause v. Tatum*, 289.

**MOTOR VEHICLES—Continued**

**Driving while impaired—sufficiency of findings of fact and conclusions of law—willful refusal to submit to breath test**—The trial court did not err in a driving while impaired case by its findings of fact and conclusions of law with respect to petitioner's willful refusal to submit to a breath test. Even though petitioner claimed that physical injuries not apparent to the chemical analyst made cooperation impossible, petitioner failed to follow the officer's instructions, there was evidence that petitioner was able to comply with the officer's instructions, and the trial judge, who was in a better position to determine the credibility of the witnesses, found that petitioner willfully refused. **Steinkrause v. Tatum**, 289.

**Operating a motor vehicle—registration and financial responsibility requirements**—The trial court had jurisdiction to find defendant guilty of operating a motor vehicle on a street or highway without the vehicle being registered with the North Carolina Department of Motor Vehicles and operating a motor vehicle on a street or highway without having in full force and effect the financial responsibility required by N.C.G.S. § 20-313. **State v. Sullivan**, 540.

**Registration and financial responsibility requirements—motion to dismiss charges—vagueness argument**—The trial court did not err by denying defendant's motion to dismiss the charges against him, including failure to register a motor vehicle under N.C.G.S. § 20-111 and failure to comply with the financial responsibility requirements under N.C.G.S. § 20-13, even though defendant contends they were void for vagueness, because defendant failed to demonstrate how these statutes failed to give him the type of fair notice that is necessary to enable him or anyone else operating a motor vehicle to conform their conduct to the law. **State v. Sullivan**, 540.

**NEGLIGENCE**

**Duty of care—general contractor to subcontractor's employee**—The trial court did not err in a negligence case arising out of a construction accident by granting summary judgment in favor of defendant general contractor and dismissing the action with prejudice because plaintiff subcontractor employee did not establish that defendant failed to exercise proper care in the performance of a duty owed to plaintiff. **Pike v. D.A. Fiore Constr. Servs., Inc.**, 406.

**OATHS AND AFFIRMATIONS**

**Trial judge—constitutionality**—The trial court's oath complied with both the United States and North Carolina Constitutions, as well as N.C.G.S. §§ 11-7 and 11-11. **State v. Sullivan**, 540.

**PARTIES**

**Subject of order not a party**—The trial court erred in a trust pursuit claim by ordering the transfer of assets from a limited liability corporation (LLC) to a trust where the LLC was not a party to the proceedings. This constituted a separate basis for vacating the judgment of the superior court. **Keith v. Wallerich**, 550.

**PLEADINGS**

**Sanctions—filing motions in violation of court rules and for improper purpose**—The superior court did not err by ordering respondent attorney to pay \$500 as a sanction for filing motions in violation of court rules because respon-

**PLEADINGS—Continued**

dent did not challenge any of the court's findings of fact that served as the bases for its decision to sanction him and conceded that the trial court had the inherent authority to sanction him. **In re Appeal of Small, 390.**

**PUBLIC ASSISTANCE**

**Medicaid—Medicare as third party provider—**The trial court did not err by concluding that the Division of Medical Assistance (which administers North Carolina's Medicaid program) had the authority to recoup money from hospitals where third-party payment sources such as Medicare were available. The hospitals bear the responsibility for pursuing payment from Medicare, and the court's declaratory judgment granting summary judgment for defendants was affirmed. **Charlotte-Mecklenburg Hosp. Auth. v. N.C. Dep't of Health & Human Servs., 70.**

**PUBLIC OFFICERS AND EMPLOYEES**

**Termination—failure to follow rules—belief that others violated rules—**Summary judgment was correctly granted against petitioner in a state employee termination case where petitioner contended that there was an issue of fact concerning her perception that others were also violating respondent's rules. She did not offer legal precedent or logical reason to suggest that her own dishonesty would be mitigated by her alleged belief that others also violated those rules. **Woodard v. N.C. Dep't of Transp., 124.**

**Termination—findings of fact—sufficiency of evidence—dismissal letter—**The trial court did not err in a state employee termination case by affirming the State Personnel Commission's decision and order adopting the administrative law judge's findings where the findings to which petitioner objected constituted a summary of the evidence or significantly mischaracterized the underlying dismissal letter. **Woodard v. N.C. Dep't of Transp., 124.**

**ROBBERY**

**Armed Robbery—lesser-included offense—instruction not given—no evidence that gun inoperable—**The trial court did not err by failing to instruct the jury on the lesser included offense of common law robbery in a prosecution for robbery with a dangerous weapon where there was testimony that a piece of the gun fell off during the robbery. Defendant did not produce any evidence that the gun was rendered inoperable. **State v. Williams, 103.**

**Common law—causing victim to flee and leave property—**The trial court did not err by denying defendant's motion to dismiss a charge of common law robbery where the State's evidence was that defendant beat the victim, ordered her to remove her clothes, went through her clothing, told her to give him the money he had given her for sex, and told her to run or he would get her. Defendant placed her in such fear as to cause her to flee, leaving the property with him. **State v. Williams, 161.**

**Murder—continuous transaction—**Two killings and a robbery occurred in one continuous transaction, and the trial court did not err by denying defendant's motion to dismiss the charge of robbery with a dangerous weapon, where there was substantial evidence that defendant used a deadly weapon to kill the victims and took their property not as an afterthought but with the intent of utilizing and selling it. **State v. Stitt, 233.**

**ROBBERY—Continued**

**Purpose of force—evidence sufficient**—The trial court did not err by denying defendant's motion to dismiss a charge of common law robbery in a prosecution involving several victims where defendant argued that the violence against the victim was a reaction to his sexual inadequacy, but the evidence tended to show that he forcibly slammed the victim onto a concrete floor, cracked her head open, and strangled her, after which she lost consciousness and awoke to find that defendant, her money, and her purse were gone. **State v. Williams, 161.**

**Sufficiency of evidence—use of force—purpose**—There was sufficient evidence for the trial court to deny defendant's motion to dismiss the charge of common law robbery where defendant argued that the use of force was in reaction to his failure to perform sexually, but there was evidence that the victim had left her possessions behind as she fled to safety. Moreover, defendant's statements and actions indicated that he intended to take the victim's property. **State v. Williams, 161.**

**Taking of property—no intent to return**—There was sufficient evidence in a robbery and murder prosecution to show that defendant took an automobile and other property out of state with no intent of returning them. **State v. Stitt, 233.**

**Use of force—sufficiency of evidence**—The evidence of defendant's use of force in a robbery prosecution was sufficient for the trial court to deny defendant's motion to dismiss where defendant contended that the use of force was a reaction to his failure to perform sexually. **State v. Williams, 161.**

**SCHOOLS AND EDUCATION**

**Amount of money for fiscal year—subject matter jurisdiction**—The trial court had subject matter jurisdiction over an action involving county appropriations for a school board where the board triggered a statutory process by resolving that the appropriated amount was insufficient, defendant appropriated an additional amount during the mediation that was part of that statutory process, and defendant then argued that the process must begin again. There is a clear legislative preference for speedy resolutions of school budget disputes. **Duplin Cnty. Bd. of Educ. v. Duplin Cnty. Bd. of Cnty. Comm'rs, 113.**

**Directed verdict—sufficiency of evidence—amount to maintain school system—amount needed from county**—The trial court did not err by denying defendant county commissioner's motions for directed verdict in a school funding case. Defendant contended that plaintiff was required to present evidence of the sources of funding that were under the control of the county commissioners for maintaining a system of free public schools, but the jury was concerned only with the adequacy of the county appropriation, not with the sufficiency of funds provided by other sources. **Duplin Cnty. Bd. of Educ. v. Duplin Cnty. Bd. of Cnty. Comm'rs, 113.**

**Due process—admission of guilt**—The superior court did not err in a declaratory judgment action by determining petitioners were provided due process in two administrative hearings that upheld their long-term suspensions from school. A procedural due process denial cannot be established when the student admits guilt since prejudice cannot be shown. Even so, there was no evidence that correction of these alleged violations would have produced a more favorable outcome for petitioners. **Hardy v. Beaufort Cnty. Bd. of Educ., 132.**

**SCHOOLS AND EDUCATION—Continued**

**Judicial review of board of education's decision—long-term suspension—res judicata and collateral estoppel**—The superior court exercised the appropriate standard of review in affirming the long-term suspensions of two students for fighting, even though the literal language of the superior court's order seemingly dismissed appellants' respective petitions for judicial review. Moreover, the doctrines of *res judicata* and collateral estoppel prevented petitioners from asserting a claim that they had previously asserted in a companion case. **Hardy v. Beaufort Cnty. Bd. of Educ.**, 132.

**Sufficiency of funds—sufficiency of evidence**—*Beaufort Cnty. Bd. of Educ. v. Beaufort Cnty. Bd. of Comm'ns*, 363 N.C. 500, expressly rejected the contention in this case that a judgment against the Board of Commissioners should be vacated because the school board did not present sufficient evidence that the school appropriation was not sufficient for statutory categories. **Duplin Cnty. Bd. of Educ. v. Duplin Cnty. Bd. of Cnty. Comm'rs**, 113.

**SEARCH AND SEIZURE**

**Motion to suppress drugs—narcotics dog—hallway outside storage unit**—The trial court did not err in a controlled substances case by denying defendant's motion to suppress evidence obtained from searches of his home and storage unit. The police were lawfully present in the common hallway outside the storage unit with a narcotics dog, and there was probable cause for a search warrant for his house based on the search of the storage unit and the statements of an informant. **State v. Washburn**, 93.

**Probable cause—informant's tip**—The trial court properly denied defendant's motion to suppress crack cocaine seized as the result of a tip from an informant where the court made unchallenged findings about the reliability of the informant in the past, the details of the information provided in this case, and the accuracy of the information provided in this case. **State v. Evans**, 572.

**Vehicle stop—white plastic grocery bag—cigar guts**—The trial court erred by denying defendant's motion to suppress marijuana found in a white plastic grocery bag in a passenger door storage compartment after defendant was stopped for not wearing a seat belt. The officer did not see or smell marijuana but asked what was in the bag and defendant responded "cigar guts." The record did no more than establish that defendant possessed a legal item without providing any indication that the item was being used in an unlawful manner. **State v. Simmons**, 698.

**SENTENCING**

**Consecutive terms of imprisonment—no abuse of discretion**—The trial court did not abuse its discretion by sentencing defendant to consecutive terms in prison where defendant committed armed robbery or attempted armed robbery on four separate occasions and threatened the lives of numerous people. **State v. Williams**, 103.

**Lifetime satellite-based monitoring—required findings**—The trial court did not follow correct procedure when including lifetime satellite-based monitoring (SBM) in defendant's sentence for indecent liberties and attempted first-degree sexual offense. The court did not make the findings required by N.C.G.S. § 14-208.40A (pre-2008 amendment) before reaching the risk assessment stage. **State v. Davison**, 354.

**SENTENCING—Continued**

**Mitigating factor—failure to show substantial assistance**—The trial court did not abuse its discretion in a trafficking in cocaine by possession case by failing to find that defendant had offered substantial assistance to mitigate his sentence because the evidence showed that not only did defendant decline a plea bargain seven times, but the information he provided was of little or no use to authorities. **State v. Steele, 689.**

**Multiple offenses—statutes read in conjunction**—The trial court erred in a prosecution for multiple breaking or entering a motor vehicle and larceny counts. The cumulative length of the sentences for two or more misdemeanors where the most serious is classified as class 1 cannot exceed 90 days, and defendant was erroneously sentenced to 150 days. While N.C.G.S. § 15A-1351 was not violated as to the sentences for each offense, the sentences must also be in compliance with N.C.G.S. § 15A-1340.22(a) when defendant is being sentenced for multiple offenses. **State v. Remley, 146.**

**Possession of firearm by felon—multiple convictions improper**—Defendant should have been charged with only one violation of N.C.G.S. § 14-415.1, instead of eleven, and the convictions for which defendant received arrested judgments were reversed. **State v. Whitaker, 190.**

**Prior record level—failure to show substantial similarity of out of state convictions**—The trial court erred in a rape, burglary, kidnapping, and sexual offense case by sentencing defendant as a level IV offender and the case was remanded for resentencing. The State failed to demonstrate to the trial court the substantial similarity between defendant's out-of-state convictions and North Carolina crimes and the Court of Appeals lacked the information necessary to conduct its own substantial similarity analysis for harmless error purposes. **State v. Henderson, 381.**

**Prior record level—out-of-state offense—failure to show substantial similarity with North Carolina offense**—The trial court's determination that defendant had a prior record level VI with 19 points was remanded for resentencing solely to determine whether defendant had 18 or 19 sentencing points where the trial court failed to determine whether a New York offense was substantially similar to a North Carolina offense. **State v. Fortney, 662.**

**Sexual offenses—aggravated—consideration of underlying facts**—The trial court erred when sentencing defendant for indecent liberties and attempted first-degree sexual offense by finding that defendant was convicted of an aggravated offense based in part on defendant's plea colloquy. The language of the statutes is clear: when making a determination pursuant to N.C.G.S. § 14-208.40A (pre-2008 amendment), the trial court is only to consider the elements of the offense for which defendant was convicted and not the underlying factual scenario. **State v. Davison, 354.**

**SEXUAL OFFENDERS**

**Lifetime satellite-based monitoring—failure to order risk assessment and follow statutory procedures**—The trial court erred by ordering defendant to enroll in lifetime satellite-based monitoring (SBM) without ordering a risk assessment and following the other procedures required by N.C.G.S. § 14-208.40A, and the case is remanded for a new SBM hearing. **State v. Smith, 681.**

**SEXUAL OFFENDERS—Continued**

**Minor—sufficiency of findings of fact—conclusions of law**—The findings of fact relevant to the trial court's conclusions of law in a sexual offense with a minor case were supported by competent evidence in the record. **State v. Hensley, 607.**

**Satellite-based monitoring—aggravated offense required**—The trial court erred by ordering defendant to enroll in satellite-based monitoring (SBM) under N.C.G.S. § 14-208.40B for the remainder of his natural life after he pled guilty to a charge of taking indecent liberties with a child under N.C.G.S. § 14-202.1 because the offense of indecent liberties with a child does not fit within the definition of an aggravated offense under N.C.G.S. § 14-208.6(1a). **State v. Singleton, 620.**

**SEXUAL OFFENSES**

**First-degree—sufficiency of evidence**—The trial court correctly denied defendant's motion to dismiss a charge of first-degree sex offense where defendant had paid the victim for a sexual act and defendant contended that the evidence was not sufficient. A reasonable mind could infer that the victim would not consent to the insertion of an object that would leave a five inch gash requiring surgery, and the evidence of defendant as the perpetrator of other offenses against the victim was sufficient to support the conclusion that he was the perpetrator of this offense. **State v. Williams, 161.**

**STATUTES OF LIMITATIONS AND REPOSE**

**Expired—summary judgment proper**—The trial court did not err in granting summary judgment in favor of defendant attorney where plaintiffs' claims for professional negligence, fraud, and obstruction of justice expired prior to the filing of their complaint. **Self v. Yelton, 653.**

**TAXATION**

**Ad valorem—amusement ride equipment—business presence—not taxed elsewhere**—Amusement ride equipment that was in North Carolina for six months of the year was subject to taxation in North Carolina where Amusements of Rochester, Inc. statutorily established its domicile in North Carolina and did not prove that the property was being taxed in another state. **In re Appeal of Amusements of Rochester, Inc., 419.**

**Property—valuation of leased computer equipment—depreciation—functional and economic obsolescence**—The Court of Appeals reversed the final decision of the Property Tax Commission regarding Durham County's valuation of 40,779 pieces of leased computer equipment for business personal property taxes in tax year 2001. The case was again remanded to the Commission for a reasoned decision with regard to what amount of depreciation should have been deducted from the valuation to account for functional and economic obsolescence due to market conditions. **In re Appeal of IBM Credit Corp., 343.**

**Qualification for credits—findings not sufficient**—The trial court applied an incorrect substantive standard to the question of whether a respondent that was engaged in NASCAR activities was entitled to receive certain tax credits available to taxpayers engaging in manufacturing. The proper construction of the relevant statutory provision requires the use of a three step analysis for identifying the "primary business" or "primary activity" in which a particular entity is engaged, with detailed findings and conclusions at all stages. Here, the decisions

**TAXATION—Continued**

of both the trial court and the Assistant Revenue Secretary were deficient and the matter was remanded for a new administrative hearing. **N.C. Dep't of Revenue v. Bill Davis Racing**, 35.

**Tax Review Board decision—standard of review**—The trial court applied the wrong standard of review to a Tax Review Board decision where the question under the applicable standard was the legal correctness of the Tax Review Board's decision, but the court's findings went far beyond the findings made below and it was clear that the additional findings had a definite effect on the trial court's decision. N.C.G.S. § 150B-51(c) does not apply. **N.C. Dep't of Revenue v. Bill Davis Racing**, 35.

**TERMINATION OF PARENTAL RIGHTS**

**Failure to serve timely summons—waiver based on general appearance**—The trial court had jurisdiction to terminate respondent mother's parental rights because, although she was not served with the summonses until after their expiration, she made a general appearance in the action before the trial court at the non-secure custody hearings, thereby waiving any objection to personal jurisdiction. **In re S'N.A.S., S'L.A.S., & S'R.A.S.**, 581.

**TRIALS**

**Motion to bifurcate—statute under which motion made**—When a motion to bifurcate a trial is made pursuant to N.C.G.S. § 1D-30, the trial court is obliged to follow the procedures set forth in that statute; however, the court is not so bound where the motion is made under the more general provision of N.C.G.S. § 1A-1, Rule 42(b). The trial court here did not abuse its discretion by releasing the jury at the conclusion of the liability phase of the trial, given the extensive discovery on damages that had been suspended at defendant's request until after liability was determined. **Land v. Land**, 672.

**Stay—action in another jurisdiction—within the discretion of the court**—The entry of an order staying an action so that it can be tried in another jurisdiction was within the discretion of the trial judge. The trial judge did not abuse his discretion by staying a North Carolina action where he thoroughly identified and analyzed the appropriate factors and reached the reasonable conclusion that staying the North Carolina action was a just result in light of a more comprehensive New York action. **Wachovia Bank v. Harbinger Capital Partners Master Fund I, Ltd.**, 507.

**WORKERS' COMPENSATION**

**Attendant care services—medical benefit—supporting evidence**—There was competent evidence in a workers' compensation case to support the Industrial Commission's findings and conclusion that plaintiff benefitted medically from attendant care services. **Boylan v. Verizon Wireless**, 81.

**Attendant care services—number of hours required—findings**—The findings of the Industrial Commission in a workers' compensation case sufficiently established the number of hours of attendant care required by plaintiff. **Boylan v. Verizon Wireless**, 81.

**Attendant care services—retroactive compensation**—The trial court did not err in a workers' compensation case by ordering defendants to pay retroactively

**WORKERS' COMPENSATION—Continued**

for attendant care services provided to plaintiff. N.C.G.S. § 97-90(a) does not require preapproval of fees charged by health care providers other than physicians, hospitals, or other medical facilities. **Boylan v. Verizon Wireless, 81.**

**Average weekly wage—improper use of wages from other jobs—**Although the Industrial Commission did not err in a workers' compensation case by using method five under N.C.G.S. § 97-2(5) to calculate plaintiff employee's average weekly wage, it misapplied the method by including wages from jobs other than the one on which he was injured. The case was remanded for a recalculation of the average weekly wage. **Barrett v. All Payment Servs., Inc., 522.**

**Failure to find permanent and total disability—supporting evidence—**There was competent evidence in a workers' compensation case to support the Industrial Commission's findings and conclusion that plaintiff was not permanently and totally disabled. **Boylan v. Verizon Wireless, 81.**

**Failure to rule on motion to stay—wrongful death claim in another state—**The Industrial Commission erred by ignoring plaintiff's motion to stay her pending workers' compensation proceedings in North Carolina so that she could pursue her wrongful death claim against defendants in Florida. Plaintiff could be deemed by the Florida courts to have elected the workers' compensation remedy, thereby precluding her wrongful death action. The Commission's opinion and award was vacated and remanded for a ruling on plaintiff's motion for a stay. **Heflin v. G.R. Hammonds Roofing, Inc., 365.**

**Findings of fact—sufficiency of evidence—**The Industrial Commission erred in a workers' compensation case by making certain findings of fact, which were supported by competent evidence. In the event the Commission decides to deny plaintiff's motion for a stay, it must make new findings of fact, based on the competent evidence, and new conclusions of law based on those findings. **Heflin v. G.R. Hammonds Roofing, Inc., 365.**

**Life care planning—necessity—abuse of discretion standard—**The Industrial Commission did not abuse its discretion by failing to find that plaintiff needed life care planning as a necessary medical treatment. The Commission gave proper consideration to testimony on the subject. **Boylan v. Verizon Wireless, 81.**

**Temporary partial disability—ability to earn wages—post injury average weekly wage—**The Industrial Commission erred in a workers' compensation case by awarding plaintiff employee temporary partial disability compensation and the case is remanded because the Commission failed to make findings about plaintiff's ability to earn wages in other fields and plaintiff's post injury average weekly wages. **Barrett v. All Payment Servs., Inc., 522.**

**Total disability—sufficiency of evidence—**The Industrial Commission did not err in a workers' compensation case by awarding plaintiff employee total disability beginning two weeks prior to 30 August 2001 and continuing until further order of the Commission based on finding 32. Although defendants contend the finding was contradicted by competent evidence of record, the Court of Appeals' duty goes no further than determining whether the record contains any evidence tending to support the finding, and finding 32 was supported by unchallenged findings 1, 28, and 29. **Barrett v. All Payment Servs., Inc., 522.**

**ZONING**

**School impact fees—indirect imposition—**In an action concerning the impact of residential developments on schools, the county's adoption of an Adequate Public Facilities Ordinance (APFO) that included a Voluntary Mitigation Payment (VMP) and similar measures was in excess of its statutory authority. Defendant may not use the APFO to obtain indirectly the payment of what amounts to an impact fee given that defendant lacks the authority to impose school impact fees directly. **Union Land Owners Ass'n v. Cnty. of Union, 374.**

**Special use permit—application in full compliance—conditions—authority—**The Board of Alderman (Board) did not exceed its authority under a zoning ordinance adopting the challenged conditions to a special use permit after voting that the permit application complied with the requirements of the ordinance. Although petitioners argued that mandatory language in the ordinance requires that the permit be granted unconditionally if it is facially complete and in compliance with the ordinance, the more appropriate reading of the ordinance is that the Board, after it votes that the application complies with requirements, still has the right to deny the application or adopt conditions pursuant to ordinance sections. **Northwest Prop. Grp., LLC v. Town of Carrboro, 449.**

**Special use permit—conditions—findings—**The trial court erred by not finding that the Board of Aldermen (Board) committed an error of law where the Board did not make any findings justifying the imposition of conditions on the granting of a special use permit. The matter was remanded for a new decision addressing all of the issues. **Northwest Prop. Grp., LLC v. Town of Carrboro, 449.**

**Special use permit—standard of judicial review—**The trial court applied the correct standard of review in examining the lawfulness of a Board of Aldermen (Board) decision to adopt conditions to a conditional use permit. Although the trial court stated that the reviewing court will normally defer to a Board within limits, nothing in the court's order indicates that it utilized this standard in reviewing any issue to which the whole record test applied. **Northwest Prop. Grp., LLC v. Town of Carrboro, 449.**

## WORD AND PHRASE INDEX

### ACCORD AND SATISFACTION

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### APPEALS

Failure to argue, **Hardy v. Beaufort Cnty. Bd. of Educ.**, 132.

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